1997

TheState of Utah v. Forrest Whittle : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee,	:	Case No. 970112
vs.	:	Priority No. 2
FORREST WHITTLE, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR MURDER, A FIRST DEGREE FELONY, IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE FRANK G. NOEL PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee,	:	
	:	Case No. 970112
vs.	:	
FORREST WHITTLE, Defendant/Appellant.	:	Priority No. 2
	:	

BRIEF OF APPELLEE

JURISDICTION and NATURE OF THE PROCEEDINGS

This is an appeal from a conviction for murder, a first degree felony, in violation of UTAH CODE ANN. § 76-5-203, in the Third District Court, Salt Lake County, the Honorable Frank G. Noel presiding. Because this is an appeal from the district court involving a conviction of a first degree felony, this Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2-2(3)(i) (1996).

ISSUES ON APPEAL and STANDARDS OF REVIEW

1. Were any alleged errors in the grand jury proceedings against defendant cured by the petit jury's verdict of guilty beyond a reasonable doubt?

If this Court agrees that defendant's subsequent conviction beyond a reasonable doubt mooted his challenge to the indictment, no standard of review applies since the Court will not be required to review any decision of the district court.

If this Court reaches the merits of defendant's claim, it must determine the standard of review, inasmuch as no Utah court has never articulated the standard applicable to such claims. However, it might follow the lead of the United States Court of Appeals for the Tenth Circuit, which reviews a trial court's order granting or denying a motion to dismiss an indictment for abuse of discretion. *United States v. Lacey,* 86 F.3d 956, 971 (10th Cir.) (citing *United States v. Strayer,* 846 F.2d 1262, 1264 (10th Cir. 1988)), *cert. denied,* 117 S. Ct. 331 (1996).

2. Did defendant's conviction improperly result from a series of erroneous evidentiary rulings?

With some exceptions, the issue of whether evidence is admissible is a question of law, reviewed for correctness, incorporating a "clearly erroneous" standard of review for subsidiary factual determinations. *Cal Wadsworth Constr. v. City of St. George,* 898 P.2d 1372, 1378 (Utah 1995) (citation omitted). An erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful. An error is harmful if it is reasonably likely that the error affected the outcome of the proceedings. *Id.* (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UTAH CODE ANN. § 77-10a-13(5) (1995):

> (a) The grand jury shall receive evidence without regard for the formal rules of evidence, except the grand jury may receive hearsay evidence only under the same provisions and limitations that apply to preliminary hearings.
>
> (b) Any person, including a witness who has previously testified or produced books, records, documents, or other evidence, may present exculpatory evidence to the attorney representing the state or the special prosecutor and request that it be presented to the grand jury, or request to appear personally before the grand jury to testify or present evidence to that body. The attorney for the state or the special prosecutor shall forward the request to the grand jury.
>
> (c) When the attorney for the state or the special prosecutor is personally aware of substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict, he shall present or otherwise disclose the evidence to the grand jury before the grand jury is asked to indict that person.

STATEMENT OF THE CASE

Defendant was indicted on 16 March 1995 on a charge of murder, a first degree felony, in violation of UTAH CODE ANN. § 76-5-203 (R. 1-2, addendum A).[1] Defendant moved to dismiss the indictment (R. 18, 25-52). The trial court denied the motion (R. 250-51, 262-63). Defendant's motion for interlocutory review was denied (R. 347).

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[1] The indictment charges defendant with "Murder, a First Degree Felony"; it cites UTAH CODE ANN. § 76-5-203 without specifying the version of the section relied upon (R. 1). At the time of the crime, this crime was actually known as "murder in the second degree." *See* amendment notes, UTAH CODE ANN. § 76-5-203 (1995). The elements of the crime charged are identical in UTAH CODE ANN. § 76-5-203 (Supp. 1985) (in effect at the time of the crime), in UTAH CODE ANN. § 76-5-203 (1995) (in effect at the time of the indictment) and in the jury instructions (R. 494).

After a four-day trial, the jury returned a verdict of guilty of murder (R. 401, 406, 412, 513, 510). Defendant was sentenced to statutory fines and sentences, plus restitution in the amount of funeral costs and counseling (R. 570). Defendant filed a motion for new trial, which was denied (R. 571-73, 595-97,653-54). Defendant timely appealed (R. 658).

STATEMENT OF FACTS[2]

The party. 11 May 1986 was Mother's Day (R. 1120, 1320, 1403). On that day, Mike Staples and defendant, Staples' former foster brother, went over to Tim Robinson's basement apartment (R. 1120-21, 1129, 1321, 1379). They arrived in the early afternoon and began to drink beer and smoke marijuana (R. 1121-22). Robinson lived with Tina Schroyer and her two kids at the corner of Eighth East and Bryan Avenue in Salt Lake City (R. 1318-19, 1377). Defendant, Staples, Robinson, and Schroyer "hung out, partied, [and] dr[a]nk" (R. 1125, 1323).

Defendant had a blue .38 caliber revolver (R. 1122-23, 1321-22, 1380). During the afternoon he pulled it out and tried to trade it to Robinson for marijuana, but Robinson did not have enough marijuana for the trade (R. 1124, 1322-23, 1379, 1381). Schroyer said, "Put that gun away," because of the children (R. 1124-25, 1381).

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[2] Except as otherwise noted, this brief recites the facts in the light most favorable to the jury's verdict. *See State v. Dunn,* 850 P.2d 1201, 1205-06 (Utah 1993).

The victim. In 1986, Lisa Strong was 25 years old (R. 1038). She worked as an artist, as a model, and at an answering service (R. 1039). She did not have a car, but used public transportation or walked (R. 1044).

The first encounter. That day at about 2:00 p.m., Lisa Strong walked past the house on Eighth East, heading southbound wearing headphones (R. 1382). Defendant tried to get her attention but she was oblivious to him due to her headphones (R. 1383). Defendant became belligerent and started swearing at her, but she just kept walking (R. 1383). According to Tina Schroyer, defendant "got mad. He was jumping around and calling her a cunt and saying that stuff about how all women are the same and he can't stand them and he was really mad" (R. 1383).

The killing. At about midnight, Staples, Robinson, and defendant were outside watching Robinson's pit bull climb a tree (R. 1128, 1390). At about that time, Staples went in the house to get another beer (R. 1127). In the house, he heard defendant's voice outside but could not make out what he was saying (R. 1128-29; *see also* 1028). Walking up the stairs from the apartment he heard five or six gunshots (R. 1129). As Staples was leaving, he came around a corner and saw defendant standing on the street lowering a handgun (R. 1129). Staples was scared and left (R. 1131).

Robinson had also gone into the house, where he heard the shots (R. 1326). He woke Schroyer and asked her if she had heard the shots (R. 1327, 1390). She did not (R. 1391). However, they both heard several dogs going "crazy" (R. 1328, 1390). Through

the window, Robinson saw someone running by the house (R. 1328). Schroyer saw that it was defendant; she recognized him by his army jacket (R. 1391-92). Schroyer went back to bed (R. 1393).

A neighbor, Norman Sharples, heard the shots, walked outside and saw and heard Lisa Strong breathe her final breath (R. 996-98).

In a few minutes Robinson heard sirens, so he went back outside, where a neighbor told him that someone had been shot (R. 1328-30). The police arrived and quite a few people gathered, among them Robinson (R. 1014-15, 1033). He walked down to the Kensington corner to see if he knew the victim, but the police were taping off the area and would not let him get close to the victim (R. 1330). Robinson offered to assist the police in locating the killer (R. 1330). He "wanted the yards around [his] house especially checked," but the police were unhelpful (R. 1330-31).

At around sunrise, Detective George Clegg noticed Tim Robinson sitting nearby (R. 1098). They spoke briefly at that time, and Robinson later called Detective Clegg at the station and left the message that he wished to speak with him (R. 1099). Clegg or another officer called him back (R. 1099).

Within a block of her home, Lisa Strong was shot with a .38 revolver in the right temple (R. 1051, 1053, 1063-64, 1077, 1113-15). The bullet entered "from back to front

slightly," and "slightly downward at a ten-degree angle" (R. 1057-58).[3] The position of Lisa's head and body at the time she was shot is unknown, though she might have been running and ducking (R. 1159-62, 1109). She died within minutes (R. 1057).

Defendant's confessions to friends. The next day defendant went over to Staples' house and told him, "Whatever you saw that night, it didn't happen" (R. 1133).

About three days after the shooting, defendant went back over to Robinson's house (R. 1394, 1434). Defendant came in to get a beer and watched Schroyer working in the kitchen for a minute (R. 1394). Then he said, "I'm the one that killed that girl" (R. 1395). When Schroyer asked which girl, defendant said, "the Strong girl, the Lisa Strong girl on the corner" (R. 1395). Schroyer asked him why he did it (R. 1395). Defendant "said because he had just gotten a gun and he wanted to see if it worked" (R. 1395). "And he thought that it was funny because she didn't even hear what was going on, she was wearing headphones" (R. 1395). In fact, Schroyer testified, defendant "thought the whole thing was funny that he did it and that he got away with it" (R. 1429).[4] Later

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[3] Two investigators testified that a "string test" from two recovered bullets suggested that shots were fired from 32 to 36 inches off the ground (R. 1527-28, 1589-90). However, the bullet "which really zeroed one of the strings" was not the one that actually struck Lisa Strong (R. 1538).

Several defense witnesses testified that they heard or saw a car drive away after the shooting (R. 1502, 1505-06, 1510). Another investigating officer testified that the shooter might have been in a car or might have been on foot (R. 1589-90).

[4] Defendant also told Schroyer he thought it was funny that the police thought a car was involved with the shooting (R. 1429).

defendant called Schroyer and in a disguised voice "said he was going to come downstairs and do me like he did Lisa Strong" (R. 1396, 1483).

A week to two weeks later, defendant bragged to Robinson that "he killed the bitch on the corner" (R. 1332, 1340). At the time, Robinson dismissed the comment as "a brag" (R. 1333, 1340).[5]

Later Robinson mentioned to Staples that someone had been shot that night, and that's when Staples "put two and two together" (R. 1133-34). Staples did not go to the police because of defendant's threatening statement to him, because he was scared, because he knew of no reason why defendant would have shot anyone that night, and because he did not actually see anyone shot (R. 1134-35).[6] Later, as Staples and his then-girlfriend were driving near the intersection of Eighth East and Kensington, he told her that defendant had shot a girl there (R. 1136, 1304).

That summer, defendant was at a Salt Lake City body shop with Douglas Bateman and other friends and said, "I capped a bitch downtown" (R. 1211-12). Bateman recounted

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[5] While incarcerated in Pennsylvania, Robinson was interviewed by two Salt Lake police officers (R. 1333, 1341-42). Although they pressured Robinson to say that he saw defendant pull the trigger, Robinson said that he did not see it, but would testify that he did (R. 1346, 1350, 1370). He told them he "didn't actually see the shooting" (R. 1371). The officers did not help Robinson to get out of jail (R. 1372-73).

[6] On cross-examination, Staples admitting having given various inconsistent accounts under oath to police and to an attorney, including the story that he was not present at all that night (R. 1137-75). On redirect, Staples testified that he denied any knowledge of the crime because police "tried to accuse me of the murder, threatened my life and my family" (R. 1179; *see also* R. 1138, 1156, 1163-64, 1182-83). He also feared defendant (R. 1165, 1183).

this comment to his wife that night (R. 1213-14, 1221). Terence Robison also heard the comment (R. 1228-29). And in December 1994, defendant told Derald Ross that he had been partying and drinking and doing drugs and used a .38 caliber pistol to kill a woman here in Utah (R. 1278-79). He said he "wasn't too concerned about the gun because the police would never find it" (R. 1279).

Defendant's statement to police. In 1991, police contacted defendant (R. 1292-93). Defendant at first denied knowing Tim Robinson; he also claimed to have no knowledge of the Lisa Strong murder (R. 1293-94, 1450). Immediately after the indictment in 1995, police again spoke with defendant (State's ex. 27). He admitted going to Tim Robinson's house to party on a "warm" day in 1986 (*id.*). He claimed that Robinson displayed a gun and that around midnight, while Robinson (with the gun), Staples, and defendant were out on the lawn, defendant turned his head and heard one shot fired (*id.*). When he looked around, defendant claimed, the gun was pointing from the northeast corner to the northwest corner of Bryan Avenue and Eighth East (*id.*).

SUMMARY OF ARGUMENT

1. a. Defendant's attack on the grand jury proceeding fails as a matter of law because a petit jury later found him guilty of murder beyond a reasonable doubt. The rule in Utah is clear that any errors in a preliminary hearing are cured by subsequent conviction. This Court should join a majority of states and federal circuits by extending this rule to grand jury indictments.

b. The Tenth Circuit is in the minority. However, its standard for reversal is high—in practice it is insurmountable—and defendant does not meet it: he has failed to demonstrate fundamental unfairness undermining the grand jury's ability to exercise independent judgment.

The prosecutor's incidental references to other shooting committed with the same gun that killed Lisa Strong did not significantly infringe on the grand jury's ability to exercise independent judgment. The grand jurors understood that the prosecutor was not accusing defendant of these crimes, which were mentioned only in response to a juror's question about the length of the proceedings. The references were more in the nature of full disclosure of the nature of the investigation than an attempt to bias the grand jury.

References to defendant's other crimes did not render the entire grand jury proceeding unfair or significantly infringe on the grand jury's ability to exercise independent judgment. This is shown, inter alia, by defendant's subsequent conviction by a petit jury that was unaware of them.

Comments by the prosecutor and prosecution witnesses about Mike Staples' various inconsistent stories—made in response to skeptical grand jury questions—are more apologetic than manipulative. In fact, the prosecutor acknowledged that his case had problems requiring an eventual petit jury to weigh credibility.

The prosecutor did not withhold substantial and competent evidence negating defendant's guilt that might reasonably be expected to lead the grand jury not to indict as defendant claims. The evidence in question was impeachment evidence that did not prevent the petit jury from convicting defendant beyond a reasonable doubt.

The prosecutor did not render the entire grand jury proceeding unfair or significantly infringe on the grand jury's ability to exercise independent judgment by introducing hearsay. Precisely what hearsay is permitted before a grand jury in Utah is less than clear. However, it is freely admissible in federal grand jury proceedings. Accordingly, its admission cannot be said to be fundamentally unfair under the Tenth Circuit's test.

2. Defendant's conviction did not result from a combination of erroneous evidentiary rulings. The rulings defendant attacks were all correct.

a. The trial court properly excluded defense witness James Sherrard's prior hearsay statements because (1) they were not against interest, and (2) they were untrustworthy. Defendant's attack on the trial court's permitting Sherrard to assert his Fifth Amendment right to remain silent fails because defense counsel called him precisely so that he would do so and hence be found "unavailable" for hearsay purposes. Since this defense tactic succeeded, any error worked in the defendant's favor.

b. The trial court properly admitted Derald Ross's testimony that defendant told him he had killed a woman in Utah with a .38 under rule 403, Utah Rules of Evidence.

A confession is highly probative. Conversely, the risk of unfair prejudice was low, since the testimony did not suggest an inappropriate basis for a verdict of guilty.

Nor can defendant prevail on his discovery challenge, which alleges that the prosecution failed to disclose the significant fact that Ross and defendant had fought in prison. This claim fails because a defendant cannot complain about a prosecutor's failure to reveal a fact of which the defendant himself has personal knowledge.

c. Defendant's statement, to several people, that he had "capped a bitch" was not ambiguous and was thus properly admitted. Defendant's argument, based exclusively on *State v. Troyer,* 910 P.2d 1182, 1191 (Utah 1995), was not preserved. Moreover, *Troyer* is easily distinguishable from the case at bar. Unlike defendant here, Troyer had committed two different assaults to which his incriminating statement might have applied; admitting it would have forced upon him the Hobson's choice of acknowledging his prior crime or allowing the jury to read the statement as referring to the charged crime. Because defendant faced no similar dilemma, *Troyer* is inapposite here.

James Bell's testimony that police had relied on Schroyer's testimony in a previous case was properly admitted to impeach his testimony that she was an unreliable informant.

Defense counsel were not deficient for not objecting to admission of Tina Schroyer's identification of defendant on hearsay grounds. A prior statement by a witness identifying a person is not hearsay. *See* Utah R. Evid. 801(d)(1)(B). Accordingly, any objection would not have been well taken.

ARGUMENT

POINT I

ANY CLAIMED ERRORS IN THE GRAND JURY PROCEEDINGS AGAINST DEFENDANT WERE CURED BY THE PETIT JURY'S VERDICT OF GUILTY BEYOND A REASONABLE DOUBT

Defendant claims that he is entitled to reversal of his conviction because the prosecutor's alleged "flagrant" misconduct during the grand jury proceeding violated defendant's right to fundamental fairness and "significantly infringed on the grand jury's ability to exercise independent judgment." Br. Aplt. at 28 (capitalization omitted).[7]

Trial court's ruling. After the indictment was returned, defendant moved the trial court to dismiss the indictment and to require that he be charged by Information

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[7] Although defendant cites to both "the Due Process Clause of the U. S. Constitution and Article I, Section 7 of the Utah Constitution," the issue is not separately briefed. *See* Br. Aplt. at 28, 34. This Court has "encouraged parties briefing state constitutional issues to use historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper interpretation of the provision in question." *Society of Separationists v. Whitehead,* 870 P.2d 916, 921 n.6 (Utah 1993) (citations omitted). "Each of these types of evidence can help in divining the intent and purpose of the framers, a critical aspect of any constitutional interpretation." *Id.* (citations omitted). Defendant's brief attempts no such analysis.

This Court will "decline to undertake a state constitutional analysis" of an appellant's claim where he does not separately brief the state constitutional claim and "'does not argue that the analysis of this issue under the Utah Constitution would be different from its analysis under the federal constitution. . . . This Court will not engage in constructing arguments out of whole cloth....'" *State v. Mace,* 921 P.2d 1372, 1376 (Utah 1996) (quoting *State v. Lafferty,* 749 P.2d 1239, 1247 & n. 5 (Utah 1988), *habeas corpus granted on other grounds, Lafferty v. Cook,* 949 F.2d 1546 (10th Cir.1991), *cert. denied,* 504 U.S. 911 (1992); *Parsons v. Barnes,* 871 P.2d 516, 519 n. 2 (Utah), *cert. denied,* 513 U.S. 966 (1994)).

Accordingly, no state constitutional claim is before this Court.

and be granted a preliminary hearing (R. 25).[8] The trial court denied the motion and ruled that, while some of the prosecutor's and the witnesses' statements to the grand jury may arguably have been inappropriate, the alleged misconduct "did not substantially influence the Grand Jury in its decision to indict the defendant" (R. 263). The court continued, "There was substantial evidence upon which the grand jury could indict the defendant. The Grand Jury's judgment was not significantly infringed by the prosecutor's conduct in this case" (R. 263).

Defendant petitioned this Court for interlocutory review, which was denied (R. 347). Defendant proceeded to trial and was, of course, convicted (R. 510).

A. Any error in the grand jury proceeding was cured by the petit jury's verdict of guilty beyond a reasonable doubt.

In seeking interlocutory review, defendant argued that such review was necessary in part because "if this Court refuses to hear Whittle's appeal now and he is convicted at trial, he might lose the right to appeal the fairness of the indictment process forever." Petition for Permission to Appeal at 9.[9] In support of this argument, defendant cited

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[8] There is authority suggesting that the district court lacked jurisdiction to entertain this motion. *See State v. Giles,* 576 P.2d 876 (Utah 1978) (per Ellett, C.J., with one justice concurring and three justices concurring in result) (quoting with approval the statement that "the trial court should not inquire into the adequacy and competency of the evidence before the grand jury").

[9] This document is not in the District Court's file, but it is in the Supreme Court's file.

State v. Humphrey, 823 P.2d 464 (Utah 1991) and *State v. Quas,* 837 P.2d 565, 566 (Utah App.), *cert. denied,* 853 P.2d 897 (1992). *Id.*[10]

Defendant's argument is correct: defendant's subsequent conviction beyond a reasonable doubt by a petit jury mooted his challenge to the grand jury proceeding.

Utah. Under the Utah Constitution, criminal offenses may be prosecuted either by information or by indictment. Utah Const. art. I sec. 13. That a subsequent conviction moots any errors in the preliminary hearing is well established. This Court in *Humphrey* held that because a preliminary hearing magistrate is not a court, a magistrate's order binding a defendant over to stand trial is not appealable. *Humphrey,* 823 P.2d at 468. The Court noted that if a bindover orders "were in fact orders of a circuit court," then the defendant would have a state constitutional right to appeal, which right "would not be satisfied if the defendant first had to endure a trial in the district court, because *any challenges to the bindover order would be mooted by the trial verdict.*" *Id.* at 467 n.6 (emphasis added).

In *Quas,* the Utah Court of Appeals held that "the question as to whether the information should have been quashed by the district court is moot because any defect was cured by defendant's conviction beyond a reasonable doubt." *Quas,* 837 P.2d at

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[10] The State's response does not dispute that a later conviction would moot defendant's grand jury claims, but states merely, "Even if true, this does not constitute a compelling ground for interlocutory review." Response in Opposition to Petition for Permission to Appeal From Interlocutory Order at 7.

567. The court relied on the above-quoted passage from *Humphrey* and on *United States v. Mechanik,* 475 U.S. 66 (1986). *Id.* at 566-67. *See also State v. Blubaugh,* 904 P.2d 688, 694 n.3 (Utah App. 1995) (following *Quas* and *Humphrey*), *cert. denied,* 913 P.2d 749 (1996).

Because an indictment is equivalent in all material respects to a bindover, any defect in an indictment must also cured by a defendant's conviction beyond a reasonable doubt.

Other states. A number of states have extended a *Humphrey/Quas*-type preliminary hearing rule to grand jury indictments. *See People v. Tyler,* 802 P.2d 1153, 1154 (Colo. App. 1990); *State v. Kilby,* 947 P.2d 420, 423-24 (Id. App. 1997); *State v. Atwood,* 832 P.2d 593, 618 (Ariz. 1992), *cert. denied,* 506 U.S. 1084 (1993); *State v. Tempest,* 660 A.2d 278, 280 (R.I. 1995); *but see Pease v. Commonwealth,* 482 S.E.2d 851, 852 n.1 (Va. App. 1997) (reversing conviction where prosecutor examined grand jury witness in violation of statute prohibiting his presence in the grand jury room). Like *Quas,* these cases rely on *United States v. Mechanik.*

U.S. Supreme Court. *Mechanik* involved a violation of a federal rule: two government witnesses appeared simultaneously before a federal grand jury. *Mechanik,* 475 U.S. at 67. The Court assumed for purposes of argument that this joint appearance violated rule 6(d), Federal Rules of Criminal Procedure, and, had there been actual prejudice, the district court would have been justified in dismissing the indictment before trial.

Id. at 69-70. The Court also acknowledged that the error "had the theoretical potential to affect the grand jury's determination whether to indict . . ." *Id.* at 70.

However, the Court stated, "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at 70.[11]

The Court reasoned that "[t]he reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences." *Id.* at 72. Moreover, the passage of time may "render retrial difficult, even impossible." *Id.* (citation omitted). "Thus, while reversal 'may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.'" *Id.* (citation omitted).

The Court held that the petit jury's guilty verdict "rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify

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[11] In a footnote, the Court recognized *Vasquez v. Hillery,* 474 U.S. 254 (1986), in which it had set aside a conviction because of racial discrimination in the composition of the grand jury, a structural error. *Id.* at 70 n.1. However, it noted that the prophylactic concerns expressed in that case "have little force outside the context of racial discrimination in the composition of the grand jury." *Id.*

setting aside the verdict simply because of an error in the earlier grand jury proceedings." *Id.* at 73.[12]

Federal circuits: majority. Most federal circuit courts of appeals have read *Mechanik* broadly according to its terms, refusing to entertain challenges to grand jury indictments after conviction by a petit jury. *See, e.g., United States v. Dugan,* 150 F.3d 865, 868 (8th Cir. 1998) (allegation that government misled grand jury rendered harmless by petit jury's guilty verdict), *cert. denied,* 119 S. Ct. 528 (1998); *United States v. Eltayib,* 88 F.3d 157, 173 (2nd Cir.) (subsequent conviction by petit jury remedies prosecutorial misconduct in grand jury proceeding), *cert. denied,* 117 S. Ct. 619 (1996); *United States v. Cobleigh,* 75 F.3d 242, 251 (6th Cir. 1996) (alleged presentation of perjured testimony to grand jury rendered harmless by subsequent conviction by petit jury); *United States*

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[12] The federal standard of reversible error in reviewing a grand jury indictment where the defendant was not yet been tried is found in *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988), a case involving non-constitutional error. The Supreme Court stated, "We hold, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254. In short, the principle of harmless error applies to grand jury proceedings just as it does to criminal trials. *Id.* at 255. A "court may not disregard the doctrine of harmless error simply 'in order to chastise what the court view[s] as prosecutorial overreaching.'" *Id.* at 256 (citation omitted, bracketed material in original). It then held that "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256 (quoting *Mechanik,* 106 S. Ct. at 945-46 (O'Connor, J., concurring)).

Moreover, "the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *United States v. "R" Enterprises, Inc.,* 498 U.S. 292, 300 (1991) (citing *United States v. Mechanik,* 475 U.S. 66, 75, 106 S.Ct. 938, 944 (1986) (O'Connor, J., concurring in judgment)).

v. Console, 13 F.3d 641, 671-72 (3rd Cir. 1993) (alleged prosecutorial misconduct rendered harmless by subsequent conviction by petit jury's guilty verdict), *cert. denied,* 511 U.S. 1076 (1994), 513 U.S. 812 (1994); *People of the Territory of Guam v. Muna,* 999 F.2d 397, 399 (9th Cir. 1993) (after conviction, claim that prosecutor failed to present exculpatory evidence was harmless beyond reasonable doubt); *United States v. Valencia-Lucena,* 925 F.2d 506, 511 (1st Cir. 1991) (conviction by petit jury cured discrepancy in DEA agent's testimony at grand jury proceeding).

Federal circuits: minority. However, three circuits have read *Mechanik* more narrowly to bar postconviction review only of so-called "technical" violations of rule 6, Federal Rules of Criminal Procedure, but not violations calling into question the "fundamental fairness" of the criminal proceedings. *See United States v. Kramer,* 864 F.2d 99, 101 (11th Cir. 1988);[13] *United States v. Johns,* 858 F.2d 154, 159-60 (3rd Cir. 1988); *United States v. Taylor,* 798 F.2d 1337, 1340 (10th Cir. 1986).

Tenth Circuit. The Tenth Circuit contrived this distinction in *Taylor,* but subsequent Tenth Circuit cases have applied it inconsistently or not at all. *E.g., compare Taylor,* 798 F.2d at 1340 (failure to present exculpatory evidence was not "technical"), *with United States v. Lopez-Gutierrez,* 83 F.3d 1235, 1244-45 (10th Cir. 1996) (failure to correct false evidence and commenting on defendant's silence were "technical errors").

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[13] The Eleventh Circuit has since held that the government's presentation of forged documents was harmless and did not so compromise the grand jury proceedings as to render them "fundamentally unfair." *United States v. Exarhos,* 135 F.3d 723, 727 (11th Cir. 1998).

In *United States v. Edgmon,* 952 F.2d 1206 (10th Cir. 1991), *cert. denied,* 505 U.S. 1223 (1992) the Tenth Circuit ignored *Taylor's* technical/fundamental distinction altogether and held that defendant's conviction must stand despite a claim that government witnesses "presented testimony to the grand jury that was misleading and inaccurate with respect to a crucial element of the crimes alleged," since the petit jury's verdict of guilty *a fortiori* established probable cause. *Id.* at 1212. *See also United States v. Page,* 808 F.2d 723, 726-27 (10th Cir. 1987) ("If a petit jury has knowledge of the same misstatement made to the grand jury and nonetheless finds a defendant guilty beyond a reasonable doubt, it is unlikely that the error before the grand jury, which must find only probable cause, was prejudicial"), *cert. denied,* 482 U.S. 918.

Indeed, the State is aware of no case, and defendant has cited none, in which the Tenth Circuit has reversed a conviction for errors in the grand jury proceeding. This Court should therefore be reluctant to reverse defendant's conviction based on the Tenth Circuit precedent he cites.

Rather, this Court should ignore the chimerical fundamental/technical dichotomy and follow *Edgmon, Mechanik,* and a majority of states and federal circuits by extending the *Humphrey/Quas* rule—that subsequent conviction cures defects in the preliminary hearing—to grand jury indictments.

Instant case. The case at bar demonstrates the wisdom of doing so. Defendant does not claim the right not to be tried. *See Midland Asphalt,* 489 U.S. at 803 ("Only

a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried"); Br. Aplt. at 80. Nor does he claim structural error in the composition of the grand jury itself. *See Mechanik,* 475 U.S. at 70 n.1. He asks only for dismissal of the indictment, Br. Aplt. at 55-56, in which event the State could presumably re-prosecute him by indictment or information. Yet there can be no doubt that, a petit jury having found defendant guilty beyond a reasonable doubt, he would be indicted again or bound over. Consequently, in this case the interests at stake weigh heavily in favor of recognizing that "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at 70.

B. Even under the Tenth Circuit standard he advocates, defendant has failed to show fundamental unfairness undermining the grand jury's ability to exercise independent judgment.

Assuming arguendo that for some reason the petit jury's verdict of guilt beyond a reasonable doubt did not cure any claimed errors in the grand jury proceeding, defendant has nevertheless failed to establish reversible error even under the Tenth Circuit standard.

Tenth Circuit standard. Under that standard, a reviewing court must first "determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process." *United States v. Kilpatrick,* 821 F.2d 1456, 1466 (10th Cir.1987).

Errors "characterized as procedural violations affecting only the probable cause charging decision by the grand jury" are mooted by the petit jury's guilty verdict. *Id.* However, errors that "can be charged as threatening the defendant's rights to fundamental fairness as going beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment, a determination of guilt by a petit jury will not moot the issue." *Id.* (citations, brackets, and internal quotation marks omitted).

"Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment." *Id.* The Tenth Circuit has not defined "fundamental fairness."[14]

The standard is high. A "presumption of regularity that attaches to grand jury proceedings," and "[d]ismissal of an indictment returned after deliberation by a grand jury is a very drastic action." *Kilpatrick,* 821 F.2d at 1473 (citation omitted).

Under Tenth Circuit precedents, presenting misleading and arguably inflammatory testimony and commenting on the defendant's silence is usually held to be either technical error, *see Lopez-Gutierrez,* 83 F.3d at 1245, or not to significantly infringe on the grand jury's ability to exercise independent judgment. *See United States v. Washington,* 1998 WL 777072, *3-4 (addendum D). Moreover, using evidence summaries, granting "informal

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[14] Some cases affirm the conviction without walking through this two-step analysis. *See United States v. Edmonson,* 962 F.2d 1535, 1539 (10th Cir. 1992); *United States v. Edgmon,* 952 F.2d 1206, 1212 (10th Cir. 1991), *cert. denied,* 505 U.S. 1223 (1992); *United States v. Pino,* 708 F.2d 523, 530 (10th Cir. 1983).

immunity," systematic violations of rule 6(d) (unauthorized persons present), imposition of unauthorized secrecy obligation on two witnesses, referring to government witnesses as "agents of the grand jury," and unjustifiable mistreatment of a witness favorable to the defense has been held not to threaten the grand jury's independence. *Kilpatrick,* 821 F.2d at 1467-75 (reversing dismissal of indictment).

If, as the State believes, the Tenth Circuit has never employed this two-step test to reverse a conviction for error in a grand jury proceeding,[15] the test is in practice not merely high, but insurmountable. Thus, the Tenth Circuit's departure from the majority view of *Mechanik* is theoretical only.

Active grand jury. The personality of the particular grand jury is relevant to the analysis. If "[t]he grand jury transcripts show an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys," that fact militates against a finding that the grand jury's independence was infringed by alleged errors. *Kilpatrick,*

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[15] The State's research did disclose a case in which the Tenth Circuit ruled that an indictment must be dismissed, but that case did not involve a subsequent conviction. *United States v. Williams,* 899 F.2d 898, 903-04 (10th Cir. 1990), affirmed the dismissal of an indictment on the ground that "the government withheld substantial exculpatory material from the grand jury." However, the Supreme Court reversed, reasoning that "requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *United States v. Williams,* 504 U.S. 36, 51 (1992).

821 F.2d at 1467-75. The grand jury here was active, independent, familiar with the record, and thoughtfully questioned witnesses and the prosecutor.

The prosecutor opened the proceeding in a low key way by explaining the process briefly to the grand jurors. He explained that "this is really an investigation, and you are here to try to decide whether or not we have enough evidence to charge someone" (R. 1746: 2). He continued: "Now, I have prepared an indictment in this case, and after you have heard from the four witnesses, I can leave the indictment with you, and you meet and decide whether or not you want to file charges. You don't have to. That's clearly your decision" (R. 1746: 2).

The prosecutor was candid about weaknesses in his case: "I will be honest with you, we don't have the gun . . . It has never been recovered. There is no physical evidence. He didn't leave any fingerprints. There is nothing of a physical nature that's recovered at the scene of the crime that links him to the shooting" (R. 1746: 7).

Detective Mike George also disclosed problems with the case. He told the grand jury that in the late 1980's police developed a suspect by the name of Paul Ezra Rhoades, but that "they could never present sufficient evidence to the Salt Lake County Attorney's Office to warrant a charge on Mr. Rhoades" (R. 1746: 15). He also disclosed that Tim Robinson, Tina Schroyer, and Michael Staples were all involved in criminal activity (R. 1746: 16-18). He also disclosed that Tim Robinson used his testimony as an "ace in

the hole," that Mike Staples spoke to police because they scared him, and that later these witnesses "began to step back from their testimony, and recan't [sic]" (R. 1746: 19).

The grand jurors actively participated in the process. They asked detailed and relevant questions, such as how many "slugs" were found; where police believed defendant was positioned when he fired the shots; whether defendant had run back towards Robinson's house (where Staples saw him) after the shooting; what the lighting conditions were; why, if Schroyer saw defendant run by after the shooting, she would not have mentioned this fact to Robinson; whether the witnesses kept silent out of fear of prosecution for their own crimes; whether the witnesses were still involved in criminal activity; what follow-up was done on other potential witnesses; the height of the retaining wall in front of Robinson's house; whether defendant's black and Hispanic friends were present at the time of the shooting and why they were not testifying; and how credible Staples and Schroyer were ("You are going to have to judge the credibility on your own") (R. 1746: 34-43). They also explored apparent inconsistencies in the versions of Staples and Schroyer (R. 1746: 37-38).

During Staples' testimony, a grand juror asked five specific questions designed to test Staples' claim that he saw defendant holding a gun (R. 1746: 60-61). Staples acknowledged that he at first denied knowing anything about the shooting, that later he talked when police "threatened me," and that still later he "recanted" (R. 1746: 67). A grand juror also explored with Staples the reasons for these flip-flops (R. 1746: 67-68).

During Schroyer's testimony, grand jurors asked about where Robinson was when Schroyer heard the shots; about Schroyer's seeing defendant; and about defendant's girlfriend, who resided in the house above Robinson and Schroyer (R. 1746: 90-92). After Schroyer testified, a grand juror confronted the prosecutor with an inconsistency in the testimony: "There is a discrepancy in his clothing. Mike says he was wearing brown shorts, and she [Schroyer] says he was wearing Levis" (R. 1746: 92).

During Detective Chuck Oliver's testimony, grand jurors questioned discrepancies between his account of Staples' first statement and Staples' own testimony; asked how much of Staples' story was reported without police revealing what they knew; asked whether Staples' first interview was recorded; and asked Oliver about intimidating Staples by making him feel "kind of coerced with a threat" (R. 1746: 98-100). Oliver acknowledged that Staples "started changing his story, wa[]vering from I wasn't even there, to I was in the house when it happened, to I don't even know what you guys are talking about" (R. 1746: 100). A grand juror also asked whether it was possible that Schroyer and Staples "have been able to get together and collaborate their stories" (R. 1746: 102).

1. The prosecutor's reference to related murders did not render the grand jury proceeding unfair.

Defendant claims that the prosecutor "threatened defendant's right to fundamental fairness by flagrantly utilizing other unrelated murders to induce the grand jury to indict." Br. Aplt. at 38 (capitalization and underlining omitted).

The prosecutor mentioned the other murders in the course of answering a grand juror's question about the scope of the proceeding:

> MR. JONES: . . . Like I say, I think the bottom line is just listen to the evidence that we have, and then make a decision on your own.
>
> GRAND JUROR: If we hand down an indictment today, what would we be doing, probably, the other times that we would be returning?
>
> MR. JONES: It is probably the same thing. What Mr. George will explain to you is what we have here is a case involving murder. It took place in 1986, May 12, a young girl Lisa Strong is her name. **What they have discovered in the course of the investigation is that the gun that was used to kill Lisa Strong was used to kill some other young women. What we think may happen, we are not sure, what may happen, if we charge in this case, it may help us solve some of the other cases.**
>
> That's why I don't know whether you will be called back again as a grand jury. But there is that possibility. **We wanted to be up front with you, and explain to you, if we hand down an indictment on this case, it may ultimately help us solve or lead to charges on some other people in connection with some other murders.** So that's why we are -- we don't know that for sure. I am not trying to get your hopes up one way or the other. But that is, indeed, a real possibility here.
>
> GRAND JUROR: You can't present those other charges in a courtroom setting unless he has been actually indicted for those other murders?
>
> MR. JONES: Yes. That's kind of what we are thinking. The police have investigated all of these murders, back in 1985 and 1986. We never felt like there was enough evidence to charge anyone on any of the cases. But we have reached a point where we think at this point that we have got to present the evidence, we have got to make a decision as to whether there is enough to go. **What we are hoping, the best-case scenario is that we will file charges, and that, maybe, by charging in this case, it may help us solve those other cases. And if that comes about, then the grand jury would be called back to decide whether there is enough evidence to charge additional defendants or additional cases.**

Just -- does that answer your question?

GRAND JUROR: Yes.

(R. 1746: 3-4, emphasis added). Later in the proceedings, a prosecution investigator testified:

> I was asked to meet with some witnesses who had met with an attorney that had been hired by the families of these victims, that there was an opportunity that, perhaps, we could put enough information together so that we could obtain an indictment in this case, particularly the Lisa Strong case, and also continue to investigate the other homicides, to see if there is a potential that anyone else in those -- involved in those homicides would be indicted.

(R. 1746: 8-9). The investigator described the four homicide victims (R. 1746: 10).

The prosecutor did not imply "that Whittle may have been a serial killer who stalked young women." Br. Aplt. at 40. Rather, he emphasized that he had "absolutely no evidence, other than the fact that the same weapon was used," that defendant committed the other killings (R. 1746: 126).

These incidental references to other crimes did not significantly infringe on the grand jury's ability to exercise independent judgment. The grand jurors understood that the prosecutor was not accusing defendant of these crimes, which were mentioned only in response to a juror's question about the length of the proceedings. The references were more in the nature of full disclosure of the nature of the investigation than an attempt to bias the grand jury.

Moreover, the fact that the prosecutor "specifically instructed the grand jury that its role was limited to a consideration of the [charged] case," mitigates any prejudice created by his reference to unrelated crimes. *United States v. Giorgi,* 840 F.2d 1022, 1032 (1st Cir. 1988).

2. The prosecutor's reference to defendant's prior crimes did not render the grand jury proceeding unfair.

Defendant claims that the prosecutor engaged in flagrant misconduct by referring to defendant's prior record and misconduct. *See* Br. Aplt. at 43. He cites references to burglaries,[16] aggravated robbery, aggravated sexual assault, and "pistol whipping a young black man . . . and taking money from him" (R. 1746: 40), and prison difficulties. Br. Aplt. at 42-43. The "most egregious" example of such testimony, according to defendant, is Mike Stales' testimony that defendant kicked his pregnant foster sister in the stomach and "made her fall down the stairs" (R. 1746: 46).

Defendant acknowledges that the Utah Rules of Evidence (other than those relating to privileges) do not apply in grand jury proceedings. *See* Br. Aplt. at 41; Utah R. Evid.

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[16] Witness Mike George referred to both home and car burglaries (R. 1746: 17-18). Defendant objects that "[a] review of Whittle's arrest record shows no arrests or convictions for burglarizing homes." Br. Aplt. at 42. However, defendant cites no record support for this factual allegation, which must consequently be disregarded on appeal. An appellate court's "review is of course limited to the evidence contained in the record on appeal." *Wilderness Building Systems v. Chapman,* 699 P.2d 766, 768 (Utah 1985). "[A]ppellate courts of this state do not consider new evidence on appeal." *Finlayson v. Finlayson,* 874 P.2d 843, 847 (Utah App. 1994) (declining to take judicial notice of date that postal zip codes were introduced to the public) (citing *Low v. Bonacci,* 788 P.2d 512, 513 (Utah 1990).

1101(b)(2). He claims rather that presentation of this evidence violated his due process rights. *See* Br. Aplt. at 41.

Evidence of prior misconduct is frequently held to have made no difference to the outcome of grand jury proceeding and thus harmless. *See Pitts v. Superior Court,* 876 P.2d 1143, 1144 (Ariz. 1994); *Commonwealth v. Vinnie,* 698 N.E.2d 896, 907-08 (Mass.), *cert. denied,* 119 S. Ct. 523 (1998); *State v. Scherzer,* 694 A.2d 196, 227 (N.J. App.), *certification denied,* 700 A.2d 878 (1997); *People v. Skinner,* 632 N.Y.S.2d 283, 284-85 (Sup. Ct. App. Div. 1995), *appeal denied,* 666 N.E.2d 1073 (1996).

Here the references were not prejudicial. Information suggesting that grand jury targets committed unrelated crimes, even where it "served no purpose except to predispose the grand jury against them," is not prejudicial where "the grand jury had credible and relevant evidence that was virtually conclusive of guilt." *United States v. Al Mudarris,* 695 F.2d 1182, 1186-87 (9th Cir.), *cert. denied,* 461 U.S. 932 (1983). Likewise, a statement by a prosecutor that the grand jury targets are "connected with organized crime and could harm" a key government witness, though improper, have been held not to be prejudicial. *United States v. Riccobene,* 451 F.2d 586, 587 (3rd Cir. 1971).

A defendant's subsequent conviction also establishes lack of prejudice. For a defendant "to show that he has been unfairly or actually prejudiced, he must show that the indictment was returned due to the grand jury's assumption [or knowledge] that [he] had a prior criminal record." *United States v. Ricks,* 817 F.2d 692, 695 (11th Cir. 1987).

A subsequent conviction beyond reasonable doubt by a petit jury "without disclosure of any prior criminal record" effectively establishes that the grand jury would have found probable cause even absent the challenged references. *Id.* at 695-96.

Accordingly, it cannot be said that these references rendered the entire grand jury proceeding unfair or significantly infringed on the grand jury's ability to exercise independent judgment.

3. The prosecutor's comments on the evidence did not render the grand jury proceeding unfair.

Defendant charges that the prosecutor in effect "participate[d] in the deliberations of the grand jury by expressing opinions on questions of fact, the weight of evidence, or the credibility of witnesses." Br. Aplt. at 43. He further complains that Detective Oliver attempted "to convince the jurors that they should not only rely on Staples' testimony, but should choose the version that most aids the state . . ." Br. Aplt. at 49.

Any such attempt by Oliver was obviously unavailing. Staples himself, testifying before the grand jury, disavowed the version that most aided the State. In the most incriminating version, Staples told police he saw defendant shoot Lisa Strong (R. 1746: 96-97). However, in his live testimony before the grand jury, Staples testified only that he heard shots, emerged from the basement, and saw defendant holding a gun (R. 1746: 52-57).

These differences were not lost on the grand jurors (*see* R. 1746: 97-99, 103, 112, 118-20). One stated, "It kind of bothers me that Mike [Staples] changed his testimony from the original interview to what he told us today" (R. 1746: 110). In fact, near the end of the proceeding the grand jury had Staples brought back in order to ask him why he gave discrepant versions (R. 1746: 122-23). At that time, he admitted lying to police about seeing defendant firing the gun (R. 1746: 122). He said he did this so "they wouldn't threaten me any more. I just told them what they wanted to hear" (R. 1746: 123).[17]

The prosecutor did not urge the grand jury to accept Staples' most incriminating version. Quite the contrary: when asked by a grand juror whether the prosecutor was "going to try and have [Mike Staples] stick to his first story," the prosecutor stated, "The thing about this case, like you say, you just have to take the witnesses the way they come to you. Sometimes they are good, and sometimes they are bad, and sometimes they are credible, and they are not" (R. 1746: 112). After noting that both versions of Staples' story put a gun in defendant's hand, the prosecutor acknowledged, "If all we had was the one witness, I don't think we would be here" (R. 1746: 113).

Defendant also labels "pernicious" the prosecution's so-called "repeated attempts to sway the grand jurors to accept as credible one version of the many accounts Staples gave to authorities . . ." Br. Aplt. at 49. He refers in particular to statements by Detective

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[17] Grand jurors also quizzed Staples on his own possible culpability as an accomplice to the murder (R. 1746: 124).

Oliver. For example, when a grand juror asked "why that is legal to intimidate a potential witness," the prosecutor asked the detective to explain about taking the statement:

> Q. You take this additional statement from him?
>
> A. Right. **Which I feel is a good statement.** We hit him cold. He had never been confronted with this before. He gave us a statement. When we told him he would have to testify against Forrest Whittle, who he admitted to us he is deathly afraid of, he started changing his story, wa[]vering from I wasn't even there, to I was in the house when it happened, to I don't even know what you guys are talking about. So he started wa[]vering in his testimony, or his version of what happened. **I don't' feel we intimidated him, or we may have gotten a little frustrated and said, "You can't keep changing your stories."**

(R. 1746: 100, emphasis added). In the context of Staples' changing stories, Oliver's statement that he feels one is good cannot have undermined the grand jury's independence.

The other examples defendant cites, *see* Br. Aplt. at 48, follow this same pattern: a skeptical grand juror confronts the prosecution about Staples' vacillations, the detective explains why he feels Staples can stick to one story, and possibly refers once or twice to the fact that Staples has "wavered" in his accounts (*see* R. 1746: 101-02, 110-11).

The comments defendant now attacks did not infringe on the grand jury's independence, because they were made in the context of the weakness of the Staples' credibility. Far from manipulating the grand jury, the prosecutor was candid about the tenuousness of his case. He noted that Staples' vacillation highlighted "the difficulty in the case," which was, he acknowledged, "a case, really, of credibility" (R. 746: 111).

And after all the comments that defendant claims disposed the jury against him, the following colloquy occurred:

> GRAND JUROR: . . . I want to know how you feel about serving an indictment. You think it is at the point where it would do society some good to actually have this man come to trial?
>
> MR. JONES: **You can tell this is a hard case.** If we have to go to trial on this one, **this will not be an easy case to prosecute.** And it will really boil down to a question of credibility. If the jury believes Mike Staples and Tina Schroyer and Tim --
>
> GRAND JUROR: Tina Schroyer really seemed like --
>
> MR. JONES: **If they don't believe these people, we will probably lose it.** We have got a family out there who wants something done. and law enforcement is trying to do something. **Sometimes you got a great case. Sometimes you don't.**

(R. 1746: 130, emphasis added). Far from pressuring or manipulating the grand jury, the prosecutor's tone is apologetic as he explains that the fervor of the victim's family is pushing a borderline case to trial, where the State's witnesses may or may not be believed.

Nor is it improper, as defendant suggests, for a prosecutor to express his opinion to a grand jury. In *United States v. McKenzie,* 678 F.2d 629, 632 (5th Cir.), *cert. denied,* 459 U.S. 1038 (1982), prosecutors "expressed their opinions on the credibility of some of the witnesses." The Fifth Circuit noted that presentation of the indictment itself informs the grand jury that prosecutors believe that an indictment should be returned. *Id.* "Thus, the fact that a prosecutor conveys such an impression to the grand jury does not require the dismissal of the indictment." *Id.* (citation omitted). "It is not improper . . . for an

attorney merely to state an opinion as to guilt or as to any fact at issue, as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and that the jury itself can evaluate." *Id.* (citation omitted). This was the case here: neither the prosecutor nor any prosecution witness implied that he knew defendant was guilty based on evidence not presented to the grand jury.

Obviously, a prosecutor's statement of his opinion is not tantamount, as defendant argues, to "participat[ing] in the deliberations of the grand jury." Br. Aplt. at 43. The State is aware of no authority, including the dated cases cited for the proposition by defendant, that equates commenting on the evidence with participating in the deliberations of the grand jury. *See Hammers v. State,* 337 P.2d 1097, 1107 (Okl. Cr. App. 1959) (prosecutor "cannot participate in the deliberations *or* express opinions on questions of fact"); *State v. Good,* 460 P.2d 662, 665 (Ariz. App. 1969) (same).

Actually, by presenting the multiple versions of Staples' story, the prosecutor was exceeding his legal obligation: a prosecutor is not "obliged to present every exculpatory version of the facts to the grand jury." *People v. Darrisaw,* 614 N.Y.S.2d 622, 624 (Sup. Ct. App. Div. 1994) (citations omitted). "A Grand Jury hearing is not intended to be a 'mini-trial' at which competing evidence is weighed and questions of fact resolved; rather, its purpose is simply to determine whether the evidence proffered by the People, if fully credited, would support a conviction." *Id.*

Finally, the fact that grand jurors have, as here, "asked pointed questions about the direction of the investigation and injected their own opinions regarding the worth of the witnesses' testimony," weighs against a finding that a prosecutor's comment affected the grand jury's credibility evaluations. *United States v. Azad,* 809 F.2d 291, 294 (6th Cir. 1986), *cert. denied,* 481 U.S. 1004 (1987).

In sum, the passages cited by defendant fall short of establishing fundamental unfairness or that the grand jury's independence was undermined.

4. The prosecutor did not withhold from the grand jury "substantial and competent evidence negating the guilt" of defendant.

Defendant claims that the prosecutor "threatened the defendant's right to fundamental fairness by failing to present exculpatory evidence" in violation of Utah law. Br. Aplt. at 49 (underlining and capitalization omitted). He relies on UTAH CODE ANN. § 77-10a-13(5)(c) and article I, section 7 of the Utah Constitution. *Id.*[18]

The "exculpatory evidence" defendant refers to is that "the prosecutor failed to fully and accurately reveal to the grand jurors Staples' and Schroyer's numerous prior inconsistent statements," including the fact "that Staples had denied in a sworn deposition having seen Whittle holding a gun immediately after the shooting." Br. Aplt. at 50-51. Defendant does not specify what inconsistent statements he relies upon.

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[18] Because defendant offers no constitutional analysis, his state constitutional claim is not properly before this Court, *see* authorities cited in footnote 7 *supra,* and will not be addressed by the State.

With respect to the presentation of "exculpatory evidence, the federal rule is clear: "requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *United States v. Williams,* 504 U.S. 36, 51 (1992) (reversing *United States v. Williams,* 899 F.2d 898 (10th Cir. 1990)). "It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge . . . and to make the assessment it has always been thought sufficient to hear only the prosecutor's side." *Id.* Thus, "neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify, or to have exculpatory evidence presented." *Id.*

By statute, Utah has adopted a different rule. UTAH CODE ANN. § 77-10a-13(5)(c) (Supp. 1998) provides:

> When the attorney for the state or the special prosecutor is personally aware of substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict, he shall present or otherwise disclose the evidence to the grand jury before the grand jury is asked to indict that person.

The statute is carefully drawn. The evidence in question must (1) be within the prosecutor's personal knowledge; (2) be substantial and competent, (3) negate defendant's guilt, and (4) reasonably be expected to lead the grand jury not to indict.

First, defendant has failed to establish that Staples' and Schroyer's prior inconsistent statements are "substantial" or that they negate defendant's guilt. The so-called

"exculpatory" evidence at issue here is pure impeachment evidence. Defendant argues that if the grand jury had "known the full extent and nature of his prior statements they reasonably could have been expected," not to believe the prior exculpatory versions, but rather "to reject his testimony all together." Br. Aplt. at 51. But "the issue of whether impeachment evidence should be considered 'exculpatory' has never been addressed in Utah, and has not been resolved with any great consistency by other jurisdictions." *State v. Mickelson,* 848 P.2d 677, 692 n.22 (Utah App. 1992) (discovery context).

Furthermore, defendant has not and cannot establish that Staples' and Schroyer's prior inconsistent statements must "reasonably [have been] expected to lead the grand jury not to indict." A trial court determining a motion to dismiss an indictment, or an appellate court hearing an appeal from a dismissal, must engage in careful analysis in order to gauge the challenged testimony's effect. Here, the petit jury has already performed the analysis. Having heard all the versions of Staples' and Schroyer's stories that defense counsel cared to lay before them, they nevertheless returned a verdict of guilty beyond a reasonable doubt. If the prior inconsistent statements were insufficient to defeat a verdict of guilty beyond a reasonable doubt, they were *a fortiori* insufficient to defeat a finding of probable cause.

Because defendant has not established that the evidence was substantial or that it negated his guilt, and because the evidence lacked the impact to lead a grand jury not to indict, this claim fails.

5. The hearsay presented to the grand jury did not subvert the fundamental fairness of the proceeding or infringe on the grand jury's ability to make an independent judgment.

Defendant claims that "the prosecutor threatened the defendant's right to fundamental fairness by improperly presenting hearsay evidence to the grand jury." Br. Aplt. at 51 (underlining and capitalization omitted). He cites chiefly to the testimony of Detective Mike George and Chuck Oliver. *Id.* at 53.

The law is unclear. In Utah, the admission of hearsay is governed by UTAH CODE ANN. § 77-10A-13(5)(a) (Supp. 1998): "The grand jury shall receive evidence without regard for the formal rules of evidence, except the grand jury may receive hearsay evidence only under the same provisions and limitations that apply to preliminary hearings." Article I, section 12 of the Utah Constitution provides: "Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule."

No statute or rule currently defines "reliable hearsay." *See also State v. Pledger,* 896 P.2d 1226, 1228-29 (Utah 1995) (not reaching the question of the admissibility of "reliable hearsay" at preliminary hearings). Defendant argues that "[t]he only sensible reference is to the Rules of Evidence. Under this interpretation the Rules of Evidence apply to grand jury proceedings in defining what constitutes 'reliable hearsay.'" Br.

Aplt. at 52. Unlike the statute, rule 1101(b), Utah Rules of Evidence, would permit more hearsay in a grand jury proceeding than in a preliminary hearing. It provides:

> (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations:
>
> . . .
>
> (2) Grand jury proceedings;
>
> . . .
>
> (5) In a preliminary examination, nothing in these rules shall be construed to prevent the admission of reliable hearsay evidence.

In sum, the law governing the admissibility of hearsay in grand jury proceedings is unclear.

If this case presented a question of admissibility, this Court might be required to clarify the rule. However, now that defendant has been convicted, admissibility is no longer the issue. Even under the standards defendant advocates, errors that are "procedural violations affecting only the probable cause charging decision by the grand jury" do not warrant reversal. *Kilpatrick,* 821 F.2d at 1466. Rather, defendant must establish that the claimed errors threatened the "fundamental fairness" of the proceeding and that "the prosecutor engaged in flagrant or egregious misconduct," which "significantly infringed on the grand jury's ability to exercise independent judgment." *Id.* Thus, the question is not one of mere admissibility, but of fundamental fairness.

Admission of hearsay does not violate fundamental fairness. This is evident from the fact that hearsay is admissible before a federal grand jury. The Supreme Court has "declined to enforce the hearsay rule in grand jury proceedings, since that 'would run counter to the whole history of the grand jury institution, in which laymen conduct their

inquiries unfettered by technical rules.'" *Williams,* 504 U.S. at 49 (citing *Costello v. United States,* 350 U.S. 359, 364, 76 S.Ct. 406, 409 (1956)). Thus, "courts have universally refused to quash indictments based on the argument that the evidence before the grand jury was hearsay." *United States v. Rogers,* 652 F.2d 972, 975 (10th Cir. 1981). Consequently, admission of hearsay in a Utah grand jury proceeding cannot reasonably be said to threaten fundamental fairness or to significantly infringe on the grand jury's ability to exercise independent judgment. To hold otherwise would be to label all federal grand jury proceedings fundamentally unfair.

Defendant cites *United States v. Estepa,* 471 F.2d 1132 (2nd Cir. 1972) for the proposition that grand jurors should not be led to believe they are getting first-hand information when they are not. *See* Br. Aplt. at 52. *Estepa* involved an indictment for narcotics violations based solely on the testimony of a police officer who, unbeknownst to the grand jury, had glimpsed from a remote location only a portion of the alleged drug transactions and filled in the rest of his narrative, including statements purportedly made by the defendants, with hearsay without disclosing his lack of first-hand knowledge. *Id.* at 1134-35. Nothing remotely similar occurred here. Defendant has identified no instance where the grand jurors mistook hearsay for non-hearsay.

It has been held that "excessive use of hearsay evidence in a grand jury proceeding may violate the defendant's Fifth Amendment rights. The grand jury may not become 'a rubber stamp endorsing the wishes of a prosecutor as a result of the needless presentation

of hearsay testimony in grand jury proceedings.'" *United States v. Flomenhoft,* 714 F.2d 708, 712 (7th Cir. 1983) (citations omitted), *cert. denied,* 465 U.S. 1068 (1984).

This grand jury clearly did not become the prosecutor's "rubber stamp." As noted above, they were active and probing. Moreover, considering only the non-hearsay testimony of Mike Staples and Tina Schroyer, who were present at the crime scene when the murder was committed, it is difficult to see how any grand jury could have failed to indict.

* * *

In sum, under *Humphreys, Quas, and Mechanik,* the petit jury's verdict of guilty beyond a reasonable doubt cures the non-structural claims of error alleged here. Even if it did not, defendant has failed to establish that fundamental unfairness in the proceeding infringed on the grand jury's ability to exercise independent judgment.

POINT II

DEFENDANT'S CONVICTION DID NOT RESULT FROM A SERIES OF ERRONEOUS EVIDENTIARY RULINGS

Defendant claims that a combination of evidentiary errors and counsel ineffectiveness undermined the jury's verdict. Br. Aplt. at 56-57.

A. The trial court properly excluded the recanted hearsay statements of James Sherrard on the ground that they were not against his interest and not trustworthy.

Defendant assails the trial court for excluding hearsay statements made by defense witness James Sherrard, an inmate who refused to testify at trial. Br. Aplt. at 59.

Hearsay rule. At the center of this claim is rule 804, Utah Rules of Evidence. That rule is divided into two subsections: subsection (b) lists hearsay statements that are admissible if the declarant is unavailable as a witness; subsection (a) defines "unavailability as a witness." The rule reads in pertinent part (boldface added):

> (a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant:
>
> (1) is exempted by ruling of the court on the ground of **privilege** from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in **refusing to testify** concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> . . .
>
> A declarant is not unavailable as a witness if the exemption, refusal, . . . is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.
>
> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> (3) ***Statement against interest.*** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> . . .
>
> (5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of **trustworthiness,** if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . .

Defendant's trial strategy. In evaluating defendant's claim, context is crucial. The issue arose from defense counsel's strategy of (1) establishing Sherrard's unavailability as a witness, and (2) admitting his prior hearsay statements as statements against interest (*see* R. 1492). Defense counsel announced her intention to call James Sherrard, then added, "My understanding is that Mr. Sh[e]rrard would be taking the Fifth Amendment if he were called" (R. 1492). She proffered statements Sherrard had made to investigators Hattonward and Couch to the effect that he was at Tim Robinson's house the entire day of the murder, that he heard shots fired, and that "at no time during that day was Mr. Whittle present" (R. 1492). Counsel argued that Sherrard's hearsay statements were admissible as statements against interest (804(c)) or under "the catch-all subsection for hearsay that has indicia of reliability" (R. 1492). She further argued that the hearsay statements were against Sherrard's interest because they placed him at the crime scene and excluded defendant from the pool of suspects (R. 1492).

The prosecutor did not challenge Sherrard's unavailability. Rather, he argued that Sherrard's statement was not against interest, but was indistinguishable from any other eyewitness testimony (R. 1495-96). He argued further that Sherrard's statement was unreliable because Sherrard had disavowed it under oath in a civil deposition (R. 1496-97).

The court ruled that the proffered statement did not qualify as a statement against interest for purposes of rule 804(3), and did not bear sufficient indicia of reliability or trustworthiness to qualify for admission under rule 804(5) (R. 1497).

In order to make a record, defense counsel then called Sherrard to the stand outside the jury's presence (R. 1497-98). Sherrard stated, "I take the Fifth and all this I told you already once. Ain't got nothing to say. What the hell is going on here? I told you this before, I have nothing to say. I don't know why you brought me down here in the first place" (R. 1499). Defense counsel did not request the court to order Sherrard to testify (*see* R. 1497-1501).

Motion at the conclusion of defense case. At the conclusion of the defense case, defendant again raised the issue of Sherrard's excluded hearsay statements. He requested "to have Mr. Sherrard brought to the Court to testify on the grounds that he was improperly allowed to plead the Fifth Amendment" (R. 1570). Counsel reasoned that it was inconsistent for Sherrard to assert that the testimony he would give would incriminate him and yet "at the same time for it to be determined that he's not making statements against his interest; and therefore his testimony cannot come in at trial" (R. 1570). Counsel further argued that if, once called, Sherrard "were to refuse to testify," that his prior hearsay statement would be admissible "under Rule 801 as a prior inconsistent statement" (R. 1570).

The prosecutor stated, "I think we covered it yesterday, Judge. I think he's entitled to take the Fifth and no basis on which the comment or statement he made to someone should be admitted" (R. 1570). The court stated only, "Okay. Very well" (R. 1570) and the trial proceeded with the State's rebuttal.

Motion for new trial. Defendant raised the issue a third time in a motion for a new trial. Defendant argued that the court should not have permitted Sherrard to assert his right to silence under the Fifth Amendment since he had waived that privilege by testifying under oath at a 1993 deposition regarding his earlier statements to investigators (R. 599). Moreover, defendant argued, if Sherrard's statements were not sufficiently incriminating to qualify as statements against interest under rule 804(3), as the trial court had ruled, they were not sufficiently incriminating to qualify for protection under the Fifth Amendment (R. 600).

In the hearing on defendant's motion, the prosecutor reminded the court of facts indicating that defendant was "directly responsible for James Sherrard taking the Fifth Amendment" (R. 1716-17). As defendant had walked past Sherrard's holding cell during trial he "made a comment to Mr. Sherrard, something to the effect, 'Do the right thing,' or, 'I'll do the right thing for you.' Certainly," the prosecutor argued, "the statement could have been interpreted as either a threat or a suggestion that if you help me, I'll help you" (R. 1713). This created a situation, the prosecutor observed, where defendant himself caused the very silence that he was attempting to use as a reason to admit Sherrard's prior hearsay (R. 1713).

The prosecutor also reasserted his argument that Sherrard's hearsay statements were neither against interest nor reliable (R. 1714-16).

The trial court found that trial defense counsel, "for whatever reason perhaps for tactical reasons, did not request that the court require Mr. Sherrard to testify" (R. 654). Indeed, the court noted, Sherrard's invocation of the Fifth Amendment "was the foundation for their argument that Mr. Sherrard was unavailable as a witness" (R. 654). Hence, the court ruled, "defendant has now waived that objection" (R. 654).

Defendant's claims on appeal. First, defendant claims that "Sherrard was improperly allowed to take the Fifth Amendment." Br. Aplt. at 62 (capitalization and underlining omitted). Second, he claims that "Sherrard should have been forced to take the stand. *Once he took the stand, if he recanted or claimed to have forgotten or denied making* his prior statements, defendant would have been able to introduce his prior statements to Hattonward and Couch as substantive evidence pursuant to Rule 801(d)(1), Utah Rules of Evidence." Br. Aplt. at 63. Finally, defendant argues that "[i]f Sherrard refused to testify despite an order of the court to do so, he would then be technically unavailable pursuant to Rule 804(a)(2). At that point Rule 804(b)(3) or (5) would be applicable." Br. Aplt. at 63.

1. Any error in permitting Sherrard to take the Fifth Amendment was unpreserved, invited, and favored defendant.

Claim of trial court error. Defendant's claim that Sherrard should not have been allowed to take the Fifth Amendment fails for at least three reasons.

First, defendant failed to preserve this claim of error by eliciting a ruling from the trial court. The court did not rule that Sherrard could legally take the Fifth Amendment. It did not need to, since the prosecutor tacitly accepted the defense claim that Sherrard was unavailable by reason of having taken the Fifth Amendment (*see* 1495-96).

"[I]t is the objecting party's obligation to obtain a ruling on the objection, or such objection is waived on appeal." *State v. Ortiz,* 782 P.2d 959, 961 (Utah App. 1989), *cert. denied,* 795 P.2d 1138 (Utah 1990) (citation omitted). *See also Cunningham v. Cunningham,* 690 P.2d 549, 552 n.2 (Utah 1984); *State v. Pacheco,* 778 P.2d 26, 29 (Utah App. 1989); *Broberg v. Hess,* 782 P.2d 198, 201 (Utah App. 1989). Consequently, this claim is waived.[19]

Second, any error was invited. Defendant called Sherrard for the express purpose of Sherrard's rendering himself unavailable by taking the Fifth Amendment as a predicate to admitting his prior hearsay statements. Accordingly, if permitting him to do so was error, the error was invited. Counsel may not affirmatively lead the court into taking

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[19] Defendant did argue at the close of the defense case that Sherrard should not have been allowed to take the Fifth Amendment because doing so was inconsistent with the court's ruling that his prior hearsay statements were not statements against interest (*see* R. 1570). However, this argument asserts a different ground than those claimed on appeal and so does not preserve them. *See Tolman v. Winchester Hills Water Co.,* 912 P.2d 457, 460 (Utah App. 1996) (objection must "be specific enough to give the trial court notice of the very error" complained of). The first time defendant asserted this "very error" was in a motion for new trial, when it was ruled untimely (*see* R. 654).

a particular action and then challenge that action on appeal. *State v. Anderson,* 929 P.2d 1107, 1109 (Utah 1996).

Finally, any error was in defendant's favor. Because Sherrard had both inculpated and exculpated defendant under oath his trial testimony was anyone's guess. In contrast, his statements to Hattonward and Couch were both fixed and exculpatory. Admitting the prior hearsay statements was thus far preferable, from a defense standpoint, to admitting Sherrard's live testimony. The first step toward seeking admission of those statements was to have Sherrard declared unavailable. Sherrard's assertion of his right to silence under the Fifth Amendment rendered him unavailable.

If the trial court had refused to permit Sherrard to take the Fifth Amendment, as defendant now claims it should have, the ruling would have stymied defendant's strategy for admitting his prior hearsay statements. Since any trial court error was in defendant's favor, he suffered no prejudice and so is not entitled to reversal on this ground. *See* Utah R. Evid. 103 (a) ("Error may not be predicated upon a ruling which adits or excludes evidence unless a substantial right of the party is affected").

Ineffectiveness claim. Defendant asserts in the alternative that his trial counsel was ineffective for not objecting to Sherrard's taking the Fifth Amendment at trial. Br. Aplt. at 64.[20]

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[20] As noted above, defense counsel did object on this ground, but the objection was untimely.

"[A] defendant claiming ineffective assistance of counsel has the difficult burden of showing *actual unreasonable representation and actual prejudice.*" *State v. Tyler,* 850 P.2d 1250, 1259 (Utah 1993); *see Strickland v. Washington,* 466 U.S. 668, 688 (1984); *State v. Taylor,* 947 P.2d 681, 685 (Utah 1997), *cert. denied,* 119 S. Ct. 89 (1998). When reviewing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Taylor,* 947 P.2d at 685 (quoting *Strickland,* 466 U.S. 668. 689 (1984)).

In order to meet the prejudice requirement, defendant must show that counsel's errors were so serious as to deprive him of a fair and reliable trial. *Id.* at 687; *State v. Templin,* 805 P.2d 182, 186 (Utah 1990). This in turn requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *Templin,* 805 P.2d at 187.

Defendant's claim fails because the record supports the trial court's surmise that defense counsel's non-objection was tactical (*see* R. 654). Far from objecting to Sherrard's assertion of the privilege at trial, counsel called him for that very purpose, with the result that he thereby become "unavailable" for purposes of rule 804(a). As noted above, neither the prosecutor nor the trial court questioned Sherrard's unavailability. Thus, not only was this strategy reasonable, it was successful.

Consequently, defendant has failed to overcome the heavy presumption that this strategy was reasonable. Nor has he demonstrated a reasonable likelihood of a different trial result had counsel not permitted Sherrard to assert his right to silence. Accordingly, defendant's ineffective assistance claim fails.

2. The trial court had no sua sponte duty to force a defense witness to take the stand.

Claim of trial error. On appeal defendant proposes a different strategy: "Sherrard should have been forced to take the stand. Once he took the stand, if he recanted or claimed to have forgotten or denied making his prior statements, defendant would have been able to introduce his prior statements to Hattonward and Couch as substantive evidence pursuant to Rule 801(d)(1), Utah Rules of Evidence." Br. Aplt. at 63.

Defendant does not specify who should have "forced" Sherrard to take the stand. If he is claiming that the court had an affirmative duty to "force" Sherrard to take the stand, the claim is unpreserved and groundless. Defendant did not ask the court to require Sherrard to take the stand (R. 1718, 1734-35). Defendant cites no legal authority, and the State is aware of none, holding that a trial court commits error by not *sua sponte* "forcing" a defense witness to take the stand.

Moreover, defendant's arguments overlooks the fact that Sherrard did take the stand; after answering a few innocuous questions he refused to testify further (R. 1498-1501).

Nor has defendant established prejudice. He speculates that if Sherrard had been put on the stand before the jury and "recanted or claimed to have forgotten or denied making his prior statements, defendant could have been able to introduce his prior statements . . . pursuant to Rule 801(d)(1), Utah Rules of Evidence." Br. Aplt. at 63.

In effect, defendant is proposing a revisionist strategy for admitting Sherrard's hearsay, relying on rule 801(d)(1) rather than rule 804(b). Rule 801(d)(1) applies when "[t]he declarant testifies at the trial or hearing . . ." Yet defendant offers no basis to believe that Sherrard would have testified at all. Sherrard was an inmate in the State penitentiary (R. 1491). The State proffered evidence that defendant's threats or promises procured Sherrard's silence; defendant speculates that Robinson's threats intimidated him (*see* R. 1713, 1716, 1731, Br. Aplt. at 63). In either case, any implication that a ruling against his Fifth Amendment claim or a threat of contempt would have induced Sherrard to testify strains credulity. In fact, the prosecutor stated below without contradiction that since Sherrard was "already doing time at the Utah State Prison," holding him in contempt "certainly isn't going to have any impact on him" (R. 1718-19).

Acknowledging this possibility, defendant states that "[i]f Sherrard refused to testify despite an order of the court to do so, he would then be technically unavailable pursuant to Rule 804(a)(2). At that point Rule 804(b)(3) or (5) would be applicable." Br. Aplt. at 63. Of course, Sherrard was treated as unavailable by virtue of his assertion of his

Fifth Amendment right to silence. Thus defendant seems to be contending nothing more than that the court found Sherrard unavailable for the wrong reason.

Defendant also devotes two sentences to challenging the trial court's ruling that Sherrard's prior hearsay statements did not satisfy the requirements of rule 804(b)(3) and (5): "His statement against Robinson was clearly against his interest in the sense that any prison inmate who testifies against another inmate risks being labeled a 'snitch.' Prisoners who are considered snitches are often not treated well by other inmates in general." Br. Aplt. at 63.

This argument was not preserved. Although the same passage appears in defendant's memorandum in support of a new trial (R. 602), the trial court correctly ruled that the claim of error had been waived by defendant's failure to timely assert it (R. 654).

In addition, this argument is inadequately briefed. Defendant's brief cites to relevant authority—rule 804(b)(3)—but does not quote or attempt to apply its terms to the facts of this case. *See* Br. Aplt. at 63. Some explication would seem to be required, inasmuch as on its face, the rule's definition of "statement against interest" excludes the fear of becoming labeled a "snitch."[21]

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[21] Rule 804(b)(3) reads:

> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to

(continued...)

A brief that contains relevant legal authorities, but pays "scant attention" to the facts and provides "no actual analysis of those facts in light of the legal authorities excerpted" does not comply with rule 24(a)(9). *Demetropoulos v. Vreeken,* 754 P.2d 960, 962 (Utah App.) (dicta), *cert. denied,* 765 P.2d 1278 (Utah 1988); *see also* Utah R. App P. 24(a)(9). An appellee should not be required "to construct and then rebut the unbriefed issue." *State v. Brown,* 853 P.2d 851, 854 n.1 (Utah 1992). Accordingly, this Court should decline to consider this argument. *See State v. Wareham,* 772 P.2d 960, 966 (Utah 1989); *State v. Amicone,* 689 P.2d 1341, 1344 (Utah 1984).

This argument lacks merit in any event. As noted above, rule 804(b)(3)'s definition of "statement against interest" excludes fear of being labeled a "snitch." *See* note 19 herein. Defendant offers no reason to read an additional category into the plain language of that rule.

Ineffective assistance. Although defendant charges his counsel with ineffective assistance for not objecting to Sherrard's taking the Fifth Amendment, he does not claim they acted deficiently by not timely requesting the court to force Sherrard to take the stand and thus be deemed unavailable pursuant to rule 804(a)(2). *See* Br. Aplt. at 64-66.

Any such claim would lack merit in any event. Defense counsel established Sherrard's

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[21](...continued)
be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

unavailability under rule 804(a)(1). Their failure to establish it also under rule 804(a)(2) was inconsequential.

B. The trial court properly admitted Derald Ross's testimony that defendant told him he killed a woman in Utah with a .38.

In about December 1994, while serving time in Gunnison for receiving and transferring a stolen vehicle, Derald Ross shared a cell with defendant (R. 1259-61, 1267). At trial, Ross testified that defendant told him that "he used a .38 caliber to kill a woman here in Utah" and that "he wasn't too concerned about the gun because the police would never find it" (R. 1278-79). He also testified that defendant had told him that the night of the homicide "they had been partying and drinking and doing drugs" (R. 127[illegible]).

1. Defendant's statement that he killed a woman in Utah was highly probative and not prejudicial.

Defendant moved to exclude Ross's testimony on the ground that, because the statement was "vague" and lacked detail as to time or place, its probative value was "very weak" and its potential for prejudice was "quite high" (R. 1268). After voir dire of Ross consuming nine transcript pages, the court denied defendant's motion (R. 1259-68, 1277).

On appeal defendant claims that because the statement lacked any reference to time, location, or the victim's name it was of "scant or cumulative probative force" and was only admitted "for the sake of its prejudicial effect." Br. Aplt. at 68.

Rule 403, Utah Rules of Evidence, provides: "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (emphasis added). Evidence "is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause the jury to base its decision on something other than the established propositions in the case." *State v. Maurer,* 770 P.2d 981, 984 (Utah 1989) (citation and internal quotation marks omitted).

The probative value of this statement was high. "[E]vidence of a confession of the crime charged is highly relevant and probative. Although it is also highly prejudicial to the defense, the inquiry is not whether the evidence is harmful to the strategy of the party opposing its introduction. Any evidence is prejudicial to the party whose theory of the case it contradicts." *State v. Rhoades,* 809 P.2d 455, 465 (Idaho 1991).

Conversely, the risk of *unfair* prejudice was low. Defendant's statement that he had killed a woman in Utah, related at trial by Ross, did not suggest to the jury an improper basis for a verdict of guilty. Defendant does not argue, nor is there any basis to argue, that the jury might have believed his statement to Ross referred to a Utah woman other than Lisa Strong and thus be inadmissible evidence of another crime. *See* Br. Aplt. at 68. The trial record is replete with evidence that defendant killed Lisa Strong and makes no reference to the death of any other Utah woman. Accordingly, the only reasonable inference possible from Ross's testimony was that defendant was confessing his murder of Lisa Strong. Consequently, the resulting prejudice was fair, not unfair.

Defendant also claims prejudice in the fact that "the prosecutor did not inform the jury that Mr. Ross was a cellmate of the defendant at the time the alleged incriminating statement was made. Instead, Ross was portrayed as a 'construction worker and the man who works part-time as a tow truck driver' (R. 1661)." Br. Aplt. at 68.

This claim is ironic considering the care that the court and prosecutor took to keep from the jury the potentially prejudicial fact that Ross and defendant had been cellmates (*see, e.g.,* R. 1253-57, 1277). If defendant had wanted that fact before the jury, defense counsel could easily have brought it out on cross-examination. Instead, while emphasizing on cross-examination that Ross had been convicted of a felony, counsel referred gingerly to the fact that he and defendant had "resided together for about two months" (R. 1280-81).

2. Defendant cannot complain that the prosecution failed to disclose, or his counsel to discover, a matter within his personal knowledge.

Defendant timely moved to exclude Ross's testimony under rule 16(g), Utah Rules of Criminal Procedure, on the ground that the State had failed to provide notes of witness interviews (R. 1268). Defendant did not seek a continuance in order to prepare to meet Ross's testimony, but argued that it would be "appropriate to sanction the State for their failure to comply with discovery by not permitting [Ross] to testify" (R. 1269). The prosecutor countered that no such notes existed (R. 1269). After voir dire of the state's investigator, the court denied the motion to exclude (R. 1277).

In a motion for new trial, defense counsel argued that the State had withheld information about its witness Derald Ross. Specifically, they argued that "[b]ecause the defense was not told about Ross until two weeks prior to trial, there was not sufficient time to request Ross's prison jacket, conduct the appropriate hearings, and sort through the information" (R. 607). The State argued that it had satisfied rule 16, Utah Rules of Criminal Procedure, and the requirements of *State v. Knight,* 734 P.2d 913 (Utah 1987) by sending defendant 1,346 pages of information and 150 photographs, by directing defendant to contact law enforcement agencies for additional information, and, one week before trial, furnishing the defense with the prosecutor's work-product notes on three witnesses, including Ross, for whom no police reports existed (R. 585-88). Ross "testified to precisely what was contained within the prosecutor's notes" (R. 588).

When asked in oral argument to specify what information counsel claimed prejudiced the defense, counsel responded that the most important fact was "the altercation between Mr. Whittle and Mr. Ross and what was the nature of the altercation and when it occurred" (R. 1708; *see also* R. 1709-11).

Claim of trial court error. The trial court ruled that "there was no violation of discovery rules" (R. 655). Moreover, the court stated that "[t]he only item of evidence that defendant can point to . . . that defense counsel did not have knowledge of prior to trial or prior to the witnesses' testimony before the jury was the fact that Mr. Ross, a cellmate of defendant on one occasion had an altercation with Mr. Whittle over Mr.

Whittle's request for sexual favors from Mr. Ross" (R. 655). The court concluded that "had this information been known to the jury it could not reasonably have made a difference in the outcome of the trial" (R. 655).

Although the trial court's ruling was correct, the easier route here is to affirm on an alternative ground. *See O'Keefe v. Utah State Retirement Board,* 956 P.2d 279, 280 (Utah 1998). Defendant's claim is defeated by the obvious and decisive fact that even if defense counsel was unaware of the altercation between defendant and Ross until shortly before Ross testified, *defendant himself knew about it.* Moreover, there was no showing at trial that the prosecutor knew about the altercation. Thus, defendant on appeal asks this Court to reverse his conviction on the ground that the prosecutor, who may not have known about the altercation, did not disclose it to the defendant, who did.

"There is substantial authority that the prosecutor cannot be cited for a discovery violation where the defendant had knowledge of the existence of the item that the State failed to disclose." *State v. White,* 931 S.W.2d 825, 832-33 (Mo. App. 1996) (citing *Hughes v. Hopper,* 629 F.2d 1036 (5th Cir.1980), *cert. denied,* 450 U.S. 933, 101 S.Ct. 1396 (1981)). *See also Jennette v. State,* 398 S.E.2d 734, 738 (Ga. App. 1990) ("The *Brady* rule applies only to exculpatory material unknown to the appellant").

In addition, defendant does not challenge the court's conclusion that the information at issue would not have altered the jury's verdict. Br. Aplt. at 70. Accordingly, any possible error was not prejudicial.

Claim of ineffective assistance. Defendant states that if this Court concludes that the failure to obtain information about the altercation between himself and Ross "was a result of defense counsel's failure to make timely requests, then Defendant would reluctantly claim that his counsel were legally ineffective." Br. Aplt. at 71.

This claim fails because defendant himself knew of the altercation. A defendant may not withhold information from his counsel and then charge them with ineffectiveness for not having discovered it without his assistance. "In general, counsel is not ineffective for failing to discover evidence about which the defendant knows but withholds from counsel." *Lackey v. Johnson,* 116 F.3d 149, 152 (5th Cir. 1997); *see also United States v. King,* 936 F.2d 477, 480 (10th Cir.), *cert. denied,* 502 U.S. 1008 (1991).

The record indicates that it was defendant, not his counsel, whose performance was deficient here. Defendant knew that he had participated in the prison scuffle. Having failed to disclose that fact to his counsel, he cannot now charge them with ineffectiveness for having failed to discover it by other means.

C. Since the record suggests no other homicide to which defendant might have been referring, his statement that he "capped a bitch" was not ambiguous and thus properly admitted under *State v. Troyer.*

The murder of Lisa Strong occurred in May of 1986. Douglas Bateman and Terence Robison testified that in the summer of 1986, in a Salt Lake City body shop, defendant said, "I capped a bitch downtown" (R. 1211-12, 1228-29). Janet Bateman, Doug Bateman's wife, testified that he recounted this comment to her that night (R. 1213-14, 1221).

Defendant claims that admission of this testimony violated rule 403, Utah Rules of Evidence. Br. Aplt. at 72-73, *see also* 68. Rule 403 claims are reviewed under a deferential standard dictating affirmance unless the trial court exceeded the limits of reasonability. *State v. Real Property at 633 East 640 North, Orem,* 942 P.2d 925, 930 (Utah 1997).

Defendant relies exclusively on *State v. Troyer,* 910 P.2d 1182, 1191 (Utah 1995), *see* Br. Aplt. at 72-73. Despite defendant's claim of preservation, Br. Aplt. at 72, at trial defendant did not assert this *Troyer* argument (*see* R. 801-10). Consequently, he did not preserve it. *See Tolman,* 912 P.2d at 460, and it is now too late to invoke an exception to the preservation requirement. *See Pledger*, 896 P.2d at 1229 n.5 (where appellant "does not argue that 'exceptional circumstances' or 'plain error' justifies a review of the issue, [this Court will] decline to consider it on appeal").

Furthermore, since *Troyer* is distinguishable, the claim lacks merit in any event. Troyer was charged with murder of an 80-year old woman. *Id.* at 1184-85. When asked if he knew why he was being arrested, Troyer responded that he had "escape[d] from prison" because "he had attempted to rape a 60-year old woman" and "[h]e was getting nervous because people were asking him questions about it." *Id.* at 1184. In fact, Troyer had pled guilty to attempted rape of an elderly woman in 1979. *Id.* at 1191. Troyer's statement was thus "highly ambiguous": it may have referred either to this prior crime or the charged crime. *Id.* The trial court excluded the statement, reasoning that admitting

it would have forced Troyer to acknowledge his prior conviction in order to dispel the inference that his statement referred to the crime charged. *Id.* This Court affirmed *Id.* at 1195.

Troyer is distinguishable. The decisive fact in *Troyer* was that Troyer's statement was ambiguous: it might have referred to the charged crime or it might have referred to a crime to which he earlier pled guilty. This ambiguity forced upon Troyer the Hobson's choice of acknowledging his prior crime or allowing the jury to read the statement as referring to the charged crime. Defendant faced no such dilemma. He never pled guilty to killing any other Salt Lake woman, nor does the record indicate that he had committed another homicide before summer 1986 to which his incriminating statement might refer.

Nor dies the lack of specificity in defendant's statement bar its admission. Troyer's statement was vague: it was not specific as to time, location, or victim. But it was not problematical because it was *vague,* as defendant claims. *See* Br. Aplt. at 72. In fact, the term *vague* does not appear in the *Troyer* opinion. Troyer's statement was problematical because it was *ambiguous*—it could refer to one of two possible crimes. Because defendant's statements here were not ambiguous, *Troyer* is inapposite.

The contrary rule—that any incriminating statement that did not specify time, place and victim is inadmissible—would be grossly unfair, permitting defendants to exclude statements simply by theorizing the possibility of some other crime to which they might refer, even though no other such crime was ever committed.

D. James Bell's testimony that the police had relied on Tina Schroyer's testimony in a previous case was properly admitted to impeach his testimony that she was an unreliable informant.

James Bell ran the task force assigned to the Lisa Strong murder (R. 1522). In the course of his investigation, Bell talked to Tina Schroyer (R. 1532). At trial, Bell was a defense witness. He testified, "Her stories changed through the course of interviews" (R. 1532). According to Bell, Schroyer never told him that defendant was ever at her house with a gun or that defendant confessed the murder to her (R. 1533).

On cross-examination, Bell left the clear impression that Schroyer was an unreliable witness, referring for example to "the numerous stories she gave us" (R. 1546). The prosecutor then asked, "Now, isn't it true that Tina Schroyer has helped you satisfactorily solve another homicide?" Bell answered "Yes" (R. 1547). Defendant objected on relevancy grounds (R. 1547). After an off-the-record sidebar discussion, the prosecutor was again allowed to ask, "She gave you information that ultimately led to the conviction of somebody else on another homicide; isn't that true?" Bell answered "Yes" (R. 1547-48).

Defense counsel made a record of the sidebar discussion, which was a defense objection on relevancy grounds (R. 1554). The court observed that the testimony might tend to impeach Bell, "inasmuch as he was attempting to make her out as . . . lacking in credibility and that they had . . . relied on her testimony on prior occasions" (R. 1555).

Alleged trial court error. Defendant claims that this testimony was irrelevant. Br. Aplt. at 75 (citing Utah R. Evid. 401). On the contrary, the fact that a police investigator

has used a particular witness to solve other crimes had a tendency to dispel the impression left by his earlier testimony that he believed she was not a reliable informant. Obviously, that an informant has proved reliable in the past is a factor relevant to assessing that informant's present reliability. *See, e.g., State v. Espinoza,* 723 P.2d 420, 421 (Utah 1986); *State v. Jordan,* 665 P.2d 1280, 1286 (Utah 1983).

Ineffective assistance claim. Defendant alleges ineffective assistance of counsel in cursory fashion, claiming that his trial counsel should have objected to Bell's testimony under rule 608(b), Utah Rules of Evidence, and *State v. Hovater,* 914 P.2d 37 (Utah 1996). *See* Br. Aplt. at 76.

An ineffective assistance claim cannot rest upon counsel's failure to object to admissible evidence. *See State v. Codianna,* 660 P.2d 1101, 1109 (Utah 1983). Nor does an attorney perform outside the wide range of professionally competent assistance by not objecting to evidence that is "arguably admissible." *Chatham v. State,* 889 S.W.2d 345, 352 (Tex. App. 1994). *See also Morris v. State,* 966 F.2d 448, 456 (9th Cir.) ("An attorney's failure to object to the admission of inadmissible evidence is not necessarily ineffective."), *cert. denied,* 506 U.S. 831 (1992); *United States v. Brown,* 739 F.2d 1136, 1146 (7th Cir.) ("failure to object to evidence that though prejudicial, is probably admissible, clearly qualifies as falling within the realm of tactics"), *cert. denied,* 469 U.S. 933 (1984); *Rice v. State,* 753 S.W.2d 726, 731 (Tex. App. 1988) ("Mere failure to object to questionable evidence or argument is not ineffective assistance of counsel, without more.").

Rule 608(b) does not support the objection defendant claims his counsel should have made. The challenged testimony was admissible under the rule's provision that specific instances of the conduct of a witness may "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

Hovater is also weak support at best for the objection defendant now claims his counsel should have made. *Hovater* involved a prosecutor's bolstering his own witness's credibility through the testimony of a friendly witness on *direct* examination; the case at bar involves a prosecutor attempting on *cross*-examination to mitigate damage to his witness's credibility inflicted by the witness currently under cross-examination.

Moreover, *Hovater* was decided only six days before defendant's trial began. *Compare* R. 968 with *Hovater,* 914 P.2d 37. "To establish a claim of ineffectiveness based on an oversight or misreading of law, a defendant bears the burden of demonstrating why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient." *State v. Dunn,* 850 P.2d 1201, 1228 (Utah 1993) (rejecting ineffectiveness claim premised on opinion decided after trial). *See also Kornahrens v. Evatt,* 66 F.3d 1350, 1360 (4th Cir. 1995) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"), *cert. denied,* 116 S. Ct. 2541 (1996); *Randolph v. Delo,* 952 F.2d 243, 246 (8th Cir. 1991) (ruling

that trial counsel was not ineffective by failing to raise Batson challenge two days before Batson was decided), *cert. denied,* 504 U.S. 920 (1992); *Babbs v State,* 621 N.E.2d 326, 331 (Ind. App. 1993) ("An attorney is not required to anticipate changes in the law and object accordingly").

Since *Hovater* was technically decided prior to defendant's trial, it is not foreclosed as a basis for an ineffective assistance claim; however, the fact that no lawyers except those representing the parties in *Hovater* would have received a copy of the opinion must figure into the calculus of whether defendant's trial counsel acted reasonably.

In view of the foregoing, and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Taylor,* 947 P.2d at 685, defendant has not established that his trial counsel's non-objection to the challenged testimony was unreasonable.

Furthermore, defendant has failed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Templin,* 805 P.2d at 187. The chance that his conviction hung on the testimony in question is remote at best.

E. Defense counsel were not deficient for not objecting to admission of Tina Schroyer's identification of defendant, since it was not hearsay under Utah R. Evid. 801(d)(1)(C).

Defendant claims that his trial counsel were ineffective for not objecting on hearsay grounds to certain testimony given by Tina Schroyer. Br. Aplt. at 76-79. After having

been impeached on the basis of previous inconsistent statements, Schroyer agreed on redirect that she had told the grand jury "that the person that you saw run by your house after you heard the dogs barking was Forrest Whittle" and that she had testified at a deposition "that the person [she] saw running by the house was Forrest Whittle" (R. 1425). Finally, she agreed that she had testified on two other occasions under oath "that the person [she] saw running by the house . . . was Forrest Whittle" (R. 1425).

Defendant argues that his trial counsel was ineffective for failing to object to these statements under rule 801(d)(1)(B). Br. Aplt. at 78-79. However, any objection would have been futile since the testimony was admissible as non-hearsay under rule 801(d)(1)(C). That subsection provides:

> (d) *Statements which are not hearsay.* A statement is not hearsay if:
> (1) *Prior statements by the witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . (C) one of identification of a person made after perceiving the person . . .

In each of the challenged statements, Schroyer identified the person she saw running by her house as defendant. Accordingly, those statements were not hearsay.

Since an ineffective assistance claim cannot rest upon counsel's failure to object to admissible evidence, *see Codianna,* 660 P.2d at 1109, this claim fails.

CONCLUSION

Defendant's conviction should be affirmed.

RESPECTFULLY submitted on 19 January 1999.

JAN GRAHAM
Attorney General

J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first-class mail this 19 January 1999 to the following:

CRAIG S. COOK
3645 East Cascade Way
Salt Lake City, Utah 84109

Counsel for Appellant

Addenda

Addendum A

E. NEAL GUNNARSON
District Attorney for Salt Lake County
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Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff -vs- FORREST LEE WHITTLE DOB: 06/22/66 Defendant.	Assigned to: E. JONES Bail: None Case No. 951900481 INDICTMENT Judge FRANK NOEL CRIMINAL HOMICIDE, MURDER, a First Degree Felony, at 800 East and Kensington, Ave., Salt Lake City, Utah, on or about May 12, 1986, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended.

THE GRAND JURY CHARGES:

Count 1

On or about May 12, 1986, at 800 East and Kensington Avenue, in Salt Lake City, Salt Lake County, State of Utah,

FORREST LEE WHITTLE

did commit Criminal Homicide, Murder, a First Degree Felony, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendant, FORREST LEE WHITTLE, a party to the offense, intentionally or knowingly caused the death of LISA STRONG; and/or intending to cause serious bodily injury to

another, committed an act clearly dangerous to human life that caused the death of Lisa Strong; and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby caused the death of LISA STRONG.

A TRUE BILL:

Bill S Smith 3/15/95
FOREMAN ON THE GRAND JURY

E. NEAL GUNNARSON
Salt Lake District Attorney

By: Ernest Jones
ERNEST W. JONES
Deputy District Attorney

Addendum B

10-6-95

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

State of Utah,	:	**MINUTE ENTRY**
Plaintiff,	:	
	:	**CASE NO: 951900481 FS**
vs.	:	
	:	**JUDGE FRANK G. NOEL**
Forrest Lee Whittle,	:	
Defendant.	:	

The court has reviewed defendant's Motion to Dismiss the Indictment together with the memos filed in connection with the motion and in addition has reviewed portions of the transcript of the grand jury proceedings, and now rules as follows:

The defendant claims numerous instances of prosecutorial misconduct and that each individual instance or an accumulation of all of the complained of instances has denied him due process and the right to a fair and unbiased grand jury. Defendant further claims that he is entitled to a preliminary hearing and lastly claims that unauthorized personnel were in the grand jury proceedings, namely a bailiff employed by the Salt Lake County Sheriff's department.

The court is of the opinion that some of the prosecutor's statements to the jury regarding other murders that may be solved if the jury indicts and the statements of the State's principal witness regarding his own personal opinions and beliefs in analyzing the evidence for the jury (such comments occurred on more than one occasion and after the first such instance the

prosecutor could have, in some appropriate fashion, cautioned its principal witness) may arguable be inappropriate. Nevertheless, the court is of the opinion that the defendant has failed to establish actual prejudice from any of these instances or from an accumulation of all of them. It cannot be said, based on this record, that the prosecutor's alleged misconduct substantially influenced the grand jury's decision to indict. There was substantial evidence upon which the grand jury could indict. It is obvious to the court upon a reading of the transcript that this grand jury's will was not overborne in any way by the prosecutor, and it is clear that the grand jury's exercise of independent judgment was not significantly infringed by the prosecutor's conduct.

The court is further of the opinion that under the law the defendant, having been indicted by a grand jury is not entitled to a preliminary hearing.

Lastly, it appears that the individual who defendant initially thought was an unauthorized person in the courtroom at the time of the grand jury proceedings, was not present and that issue therefore is moot.

For the reasons stated above the court denies the defendant's Motion to Dismiss the Indictment.

The District Attorney's office is directed to prepare an order consistent with this ruling.

Dated this 16th day of October, 1995.

Frank G. Noel
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following this _____ day of October, 1995.

Ernest W. Jones
Deputy District Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, UT 84111

Lynn R. Brown
Rebecca C. Hyde
Salt Lake Legal Defender Association
Attorney for Defendant
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_____

Addendum C

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- FORREST LEE WHITTLE, Defendant.	AMENDED ORDER ON MOTION TO QUASH GRAND JURY INDICTMENT Case No. 951900481FS Hon. Frank G. Noel

The defendant's Motion to Quash the Indictment of the Grand Jury came on for hearing on September 6, 1995. The Court having reviewed the Grand Jury transcript, the Memorandums of law submitted by both State and the defendant, and having heard the oral arguments of counsel enters the following findings of fact:

1. Some of the prosecutor's statements to the Grand Jury may arguably have been inappropriate.

2. Some of the statement's by the witnesses regarding their personal opinion or beliefs in analyzing the evidence may have been inappropriate. Such comments occurred on more than one occasion and after the first such instance the prosecutor could have cautioned its principal witness.

3. The defense failed to establish actual prejudice from any

of the remarks or from an accumulation of all of remarks by the prosecutor or the witnesses.

4. The alleged misconduct did not substantially influence the Grand Jury in its decision to indict.

5. There was substantial evidence upon which the grand jury could indict the defendant. The Grand Jury's judgment was not significantly infringed by the prosecutor's conduct in this case.

6. The individual who the defendant thought was in the courtroom (Kevin Taylor - Salt Lake County Sheriff's Office) was not present during the Grand Jury proceedings.

Based on the Findings of Fact the Court enters the following Conclusion of Laws:

1. Defendant is not entitled to a preliminary hearing because he was indicted by a Grand Jury.

2. The Grand Jury proceedings were legal and appropriate. The defendant suffered no actual prejudice from the proceedings.

3. The defendant's Motion to Quash the Indictment is denied.

DATED this 3rd day of November, 1995.

BY THE COURT:

FRANK G. NOEL
DISTRICT COURT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Order On Motion to Quash Grand Jury Indictment was delivered to Lynn R. Brown and Rebecca C. Hyde, Attorney for Defendant Forrest Lee Whittle, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the ____ day of November, 1995.

_____

Addendum D

UNITED STATES of America, Plaintiff-Appellee,

v.

Chad WASHINGTON, Defendant-Appellant.

No. 97-3201.

United States Court of Appeals, Tenth Circuit.

Nov. 4, 1998.

PORFILIO, BRORBY, and MURPHY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

PORFILIO.

***1** Chad Washington was convicted of possession with intent to distribute crack cocaine. The principal evidence against him was nearly 500 grams of that substance found in a safe bearing Mr. Washington's palm print, a tape recording in which he discussed the cocaine, and large amounts of cash found on his person and in his cars. Mr. Washington challenges much of this evidence. On appeal, he argues: (1) the cumulative effect of governmental misconduct before the district court deprived him of his Constitutional rights to a fair trial and due process of law; (2) the district court erred in failing to exclude evidence on his prior convictions and cash possession; (3) the district court erred in instructing the jury on aiding and abetting; (4) the district court erred in failing to properly define "intent" in its instructions to the jury; (5) the district court erred in overruling his objections to sentencing; and (6) the district court erred in denying a new trial based on newly discovered evidence. Finding no prejudicial error, we affirm.

On April 30, 1996, Wichita, Kansas police officers executed a search warrant at 1545 North Pershing, the residence of co-defendant Sharron Griffin. During the search, officers located crack cocaine in two bedrooms and in the safe found in her living room closet. The cocaine in the safe was packaged in seventeen bags, each of which weighed approximately one ounce. Taken together, all the cocaine found in the house weighed 479.6 grams. Ms. Griffin was arrested for possession with intent to sell cocaine.

Following her arrest, Ms. Griffin denied ownership of the safe and told the police that Mr. Washington had brought the safe to her home. A palm print lifted from the safe matched that of Mr. Washington. Ms. Griffin agreed to cooperate with police.

At the suggestion of the police, Ms. Griffin used a tape recorder to record a conversation in which she, her sister, and Mr. Washington discussed the safe and its contents. After recording the conversation, Ms. Griffin returned to her home, rewound the tape, and listened to be sure she had captured Mr. Washington's voice. She then telephoned Detective Riniker of the Wichita Police Department who asked Ms. Griffin if she had remembered to record, either at the beginning or end of the tape, her name, and the date and time of the conversation with Mr. Washington. Believing she was at the end of the tape, Ms. Griffin recorded the information. As it turned out, she had recorded over part of her conversation with Mr. Washington.

Soon after adding her name, date, and time, Ms. Griffin turned the tape over to Detective Riniker. In the surviving portion of the tape, Mr. Washington neither expressly admits nor denies ownership of the

safe and its contents; however, he does suggest to Ms. Griffin that she tell police that another individual owned the safe.

As the case was developed, Mr. Washington was connected to two critical addresses and one vehicle. He owned property at 2253 S. Belmont which he deeded to his mother and girlfriend prior to his arrest. He also claimed residence at 133 W. May, # 504. The addresses and the vehicle assume importance because of what was seized from each.

*2 At 2253 S. Belmont, police found an Infinity Q45 automobile they claimed belonged to Mr. Washington from which they took $38,900. Although Mr. Washington argued the car did not belong to him and the cash found inside belonged to his mother and her cousin, documents found inside the vehicle established Mr. Washington had paid for repairs to that vehicle. Further, an Infinity key had been found during the search of 2253 S. Belmont.

A.

Mr. Washington's first allegation of error is that he was denied due process because the police destroyed a portion of the audio tape that was admitted into evidence. We review for clear error the district court's determination that the government did not destroy potentially exculpatory evidence in bad faith. United States v. Parker, 72 F.3d 1444, 1451 (10th Cir.1995).

As he did in the district court, Mr. Washington argues law enforcement officers listened to the tape and knew its content prior to the partial destruction. Mr. Washington has provided no support for his contention.

Government actors have a duty to preserve evidence that is Constitutionally material. Id. To satisfy the test for Constitutional materiality, the evidence must possess an exculpatory value that was apparent to police before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The mere "possibility" that evidence could have exculpated a defendant does not suffice to establish that its exculpatory value was "apparent" to police. Parker, 72 F.3d at 1451. The availability of a witness, such as Ms. Griffin's sister, who could testify about the content of the destroyed evidence presents other reasonable means by which the defendant could have acquired comparable evidence. Id. at 1452. [FN1] In the absence of apparent exculpatory value, a party must show bad faith in the government's destruction of evidence. Id. at 1451. Mere negligence does not establish bad faith in this context. Id.

> FN1. In Parker, a highway patrol officer accidentally erased a portion of a video taped car stop. This court found no error in the district court's denial of the defendant's motion to dismiss. United States v. Parker, 72 F.3d 1444, 1452 (10th Cir.1995).

The trial court examined the tape and heard the testimony of Sharron Griffin and Detective Riniker. Mr. Washington has provided nothing to establish the district court committed clear error in determining the government did not destroy potentially exculpatory evidence in bad faith and in denying the motions for sanctions and dismissal.

B.

Defendant next argues the independence of the grand jury was corrupted by the presentation of "false evidence." We review de novo the district court's denial of a motion to dismiss a grand jury indictment. United States v. Cowan, 116 F.3d 1360, 1361 (10th Cir.1997).

*3 Mr. Washington made a pretrial motion to dismiss the indictment upon grounds of alleged prosecutorial misconduct, including the prosecutor's knowing presentation of false testimony to the grand jury. The district court denied the motion.

This court has explained that consideration of dismissal of an indictment because of prosecutorial misconduct before a grand jury requires weighing several factors:

> First, a reviewing court must determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process. If the errors can be characterized as procedural violations affecting only the probable cause

> charging decision by the grand jury, then the defendant must have successfully challenged the indictment before the petit jury rendered a guilty verdict. If, however, the errors can be charged as threatening the defendant's rights to fundamental fairness as "going beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment," a determination of guilt by a petit jury will not moot the issue.
> Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment. Thus even assuming misconduct, a failure by the defendant to show a significant infringement on the ability of the grand jury to exercise its independent judgment will result in the denial of a motion to dismiss.

United States v. Kilpatrick, 821 F.2d 1456, 1466 (10th Cir.1987) (citations and internal quotations omitted).

Applying the first factor, we must ask if the alleged governmental misconduct is merely "technical." "Technical" errors are of a procedural nature and do not involve claims of fundamental fairness. United States v. Taylor, 798 F.2d 1337, 1339-40 (10th Cir.1986) (citing United States v. Mechanik, 475 U.S. 66, 71-72, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986)). By contrast, Mr. Washington's challenge to the grand jury indictment asserts the prosecutor elicited perjured testimony or at least led the witness to make false implications regarding the evidence. Id. Because Mr. Washington's claims fall in the category of right to fundamental fairness, they are not mooted by the petit jury's determination of guilt.

Second, under the Kilpatrick test, we hold the prosecutor's behavior did not rise to the level of "flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment." On the tape recording submitted into evidence, Mr. Washington does not deny ownership of the cocaine. He also does not admit ownership. Mr. Washington's argument here is that the question and answer sequence asserts or implies the false statement that he did admit ownership. Mr. Washington argues that because the police officer stated he had listened to the tape, he must have known there was no such statement. Therefore, the officer's testimony amounts to perjury, and the prosecutor's failure to correct the incorrect implication amounts to the presentation of false evidence to the grand jury. At the very least, Mr. Washington argues, "if evidence exists ... which casts serious doubt on the credibility of testimony which the jurors are asked to rely upon in finding an indictment, the prosecutor has an ethical duty to bring it to their attention." Nonetheless, we do not think that the testimony is so misleading it merits dismissal of the indictment.

***4** Indeed, we have allowed an indictment to stand even in cases of perjured testimony before a grand jury if independent evidence exists to support the charges on the assumption the grand jury would have returned the indictment without the perjurious testimony. United States v. Pino, 708 F.2d 523, 530 (10th Cir.1983). Even though a defendant's admission of guilt might have significant impact on the jury in this case, there was a great deal of other evidence of Mr. Washington's participation in the charged activity. We think the prosecutor's behavior did not significantly infringe on the grand jury's ability to exercise independent judgment, and the district court correctly denied the motion to dismiss the indictment.

C.

Mr. Washington next challenges the search warrant for 2253 S. Belmont. As a general matter, we review de novo the district court's determination of reasonableness under the Fourth Amendment. United States v. Kennedy, 131 F.3d 1371, 1375 (10th Cir.1997). Several issues are raised in connection with the warrant.

The first question is whether defendant had standing to attack the warrant. We review standing de novo. United States v. Shareef, 100 F.3d 1491, 1499 (10th Cir.1996). At trial, Mr. Washington contended 2253 S. Belmont was not his home, but the government argued it was. On appeal, the parties reverse their positions.

When a warrant to search 2253 S. Belmont was issued, Mr. Washington had deeded away his title to his mother and his girlfriend two months before. When arrested on August 15, 1996, Mr. Washington gave 133 West May, # 504 as his address. Mr. Washington had resided at 2253 S. Belmont with his girlfriend for at least several months and made the

mortgage payments. The district court found these facts supported Mr. Washington's reasonable expectation of privacy in the residence he shared with his girlfriend. See United States v. Donnes, 947 F.2d 1430 (10th Cir.1990). We agree. Defendant next challenges the evidence presented to the issuing magistrate. We review "the reasonableness of a warrant to determine whether the issuing magistrate had a substantial basis for finding probable cause, giving great deference to the issuing magistrate's decision." Kennedy, 131 F.3d at 1375. Mr. Washington argues statements made by the affiant in support of the warrant were false or misleading; therefore, they cannot properly serve as the basis for the warrant. We do not reach this issue because Mr. Washington did not raise it at trial. The failure to raise a Fourth Amendment challenge at trial waives the issue on appeal. United States v. Hart, 729 F.2d 662, 665 (10th Cir.1984). If a party raises the same general category of issues presented at trial, but adds a new or changed theory, we do not consider the new or changed theory on appeal. See Bancamerica Commercial Corp. v. Mosher Steel of Kansas, 100 F.3d 792, 798-99 (10th Cir.1996). Vague references to a point made before the district court do not preserve the issue for appeal. Tele-Communications, Inc. v. Commissioner, 104 F.3d 1229, 1233 (10th Cir.1997).

*5 Although Mr. Washington challenged the search warrant on several grounds at trial, none of these included his present contention the underlying affidavit contained false statements which were the basis for the magistrate's finding of probable cause. It is a new theory not considered by the district court in determining whether the supporting affidavit provided a substantial basis for probable cause. Therefore, we shall not consider this new theory on appeal.

D.

Defendant next challenges the scope of the seizures. We review the district court's determination of reasonableness under the Fourth Amendment de novo. Kennedy, 131 F.3d at 1375.

Armed with a warrant, DEA officers searched 2253 S. Belmont. Items seized pursuant to the warrant included marijuana, paraphernalia, currency, documentation and scales. The officers also seized certain items not listed including a washer, dryer, television, lawn mowers, three-wheel vehicle, two video cameras and two tripods. Detective Riniker of the Wichita Police Department was unable to ascertain when and by whom these items had been purchased but seized them at the direction of the DEA officers. At an evidentiary hearing, the district court determined the items were properly seized under the civil forfeiture statute, 21 U.S.C. §§ 881(a)(6), (b)(1), because they were discovered incident to the execution of a valid search warrant and because the officers had a good faith belief the items represented proceeds of criminal activity.

Only evidence improperly seized outside the scope of a search warrant, and not all evidence, must be suppressed unless there was a flagrant disregard for the terms of the warrant. United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 875 (10th Cir.1992). Like U.S. Currency, officers here seized items that had been named in the warrant and were indicative of drug trafficking involvement, in addition to the extra items not named in the warrant. At the time, however, Detective Riniker had information Mr. Washington had purchased cars and a house while unemployed and had been found to have large sums of cash on his person.

In light of the officer's information and the items named in the warrant and seized at the house, the district court found the officers had a good faith belief the unnamed items represented proceeds of criminal activity. Although a lawn mower, washer, and dryer arguably are not obvious evidence of drug activity, items such as jewelry and tractors were seized under similar circumstances in U.S. Currency. In denying Mr. Washington's motion to suppress, the district court ruled correctly.

E.

Defendant next asserts the government failed to comply with Fed.R.Crim.P. 16 and the discovery order. Discovery rulings of the trial court are reviewed for abuse of discretion. GWN Petroleum Corp. v. OK-TEX Oil & Gas, Inc., 998 F.2d 853, 858 (10th Cir.1993). We review allegations of Brady [FN2] violations de novo. United States v. Woodlee, 136 F.3d 1399, 1411 (10th Cir.1998).

FN2. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

*6 Before Mr. Washington's August 26, 1996 detention hearing, the prosecution provided Mr. Washington with a copy of his audio taped conversation with Ms. Griffin. On the same day, the government filed its motion for detention which included attachments such as a draft transcript of the tape recording, Mr. Washington's prior record, copies of police reports of prior arrests, paperwork seized from Mr. Washington and various automobiles, the fingerprint report, and several witness statements.

On January 24, 1997, Mr. Washington's counsel made several motions for sanctions on alleged government suppression of the original audio tape and testimony regarding the destroyed portion of the tape. He also asked for dismissal or an order setting a deadline for government compliance with the discovery order. By the time of the hearing on these motions, the government had delivered, or promised to deliver the next day, most of the requested discovery. The district court ordered the government to turn over the list of Ms. Griffin's drug sources and any Brady material. The court also noted the government could not provide a record of the statements deleted from the audio tape because none existed. The trial court did not rule specifically on the original version of the audio taped conversation, although the prosecution notes that on October 24, 1996, defense counsel heard and recorded the original tape. The government complied with the January 31, 1997 discovery order by turning over materials before trial.

Fed.R.Crim.P. 16(d)(2) confers upon a trial court broad discretion in imposing sanctions on a party failing to comply with discovery orders. United States v. Wicker, 848 F.2d 1059, 1060 (10th Cir.1988). Mr. Washington has made no showing that the prosecution failed to comply with discovery orders or that any unnecessary delay resulted from the time frame in which defense counsel received discovery materials. Mr. Washington provides no support for the claim that the trial court abused its discretion in its treatment of the discovery issues before it.

Following a hearing on Mr. Washington's pretrial motion to compel disclosure of certain evidence under Brady, the district court ordered the government to disclose to the defense any evidence it had regarding Ms. Griffin's cocaine sources. After an in camera hearing, the district court decided not to compel the government to disclose the identity of a confidential informant who had purchased drugs at the home of Ms. Griffin. Before trial, the government provided Mr. Washington with a list of sources named by Ms. Griffin in questioning. During cross-examination, however, Ms. Griffin named two cocaine suppliers whose names did not appear on the list provided to Mr. Washington before trial.

A defendant establishes a Brady violation by demonstrating: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material. Woodlee, 136 F.3d at 1411. We have explained, "Brady mandates reversal when a failure to disclose is coupled with a finding that the evidence is 'material,' meaning 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " United States v. Scarborough, 128 F.3d 1373, 1376 (10th Cir.1997) (citing United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

*7 Mr. Washington sought information on Ms. Griffin's drug suppliers to support his theory that Ms. Griffin had obtained the crack cocaine found in the safe from a supplier other than Mr. Washington, and he had not been the owner of the seized cocaine. Mr. Washington argues Ms. Griffin was an admitted cocaine dealer who supported her children with the proceeds of her dealing. According to Mr. Washington, the cocaine in the safe was left either by Ms. Griffin's husband (before he began serving jail time) or supplied by another dealer. A complete list of suppliers and access to the confidential informant who "might help disclose the identities" of suppliers would assist Mr. Washington in demonstrating he was not the owner of the safe and its contents.

Although Mr. Washington's theory may be rational, it does not satisfy this court's standards for establishing a Brady violation. First, Mr. Washington has not shown the prosecution suppressed evidence. The government complied with the district court's orders to turn over its list of suppliers before trial. See Scarborough, 128 F.2d at 1376 ("Brady is not violated when the Brady material is made available to defendants during

trial."). The government turned over the material it had; there is no support for the implication that the government suppressed advance notice of the names of the additional sources identified by Ms. Griffin at trial.

Second, the additional names and information appear to have only marginal "favorable" value to Mr. Washington. As the district court acknowledged, Mr. Washington was "entitled to attempt to establish that he was not the owner of the crack cocaine and that Griffin obtained the crack cocaine from some other supplier." However, the fact Ms. Griffin had two or four drug suppliers is equally unhelpful to Mr. Washington in the absence of any evidence one of them owned the safe and its contents. Third, Mr. Washington has not demonstrated the new evidence was material. The jury heard the names and still did not find in Mr. Washington's favor. Defense counsel heard the names but did not introduce evidence about these additional suppliers [FN3] or claim that he would have if provided with the names at an earlier date. There is no reasonable probability that disclosure of the two names or of the identity of the confidential informant would have produced a verdict in Mr. Washington's favor.

> FN3. Ms. Griffin revealed the names in cross-examination on Thursday. The government rested Monday. If the weekend would not have provided defense counsel with sufficient time to obtain evidence about the additional drug suppliers, it certainly would have been enough time to prepare a motion for a continuance to investigate the information. United States. v. Kelly, 14 F.3d 1169, 1176-77 (7th Cir.1994); see also United States v. Johnson, 911 F.2d 1394, 1404 (10th Cir.1990) (stating the defendant should have moved for a continuance if he needed more time to investigate evidence that failed the Brady materiality test).

F.

Mr. Washington specifically challenges the prosecutor's statements about the criminal convictions of his friends, his firearms possession, and his domestic violence arrest. We review for abuse of discretion the district court's denial of a defendant's motion for a new trial based on claims of improper statements by the prosecutor. United States v. Oles, 994 F.2d 1519, 1524 (10th Cir.1993).

*8 At trial, defense counsel attempted to impeach Ms. Griffin by cross- examining Officer Walker about the fact that Johnny Dean, who was found in Ms. Griffin's home on the night of her arrest, had a felony conviction. In his objection, the prosecutor stated if the court was going to permit impeachment by evidence that a witness had friends with convictions, the prosecution would employ the same tactic by impeaching Mr. Washington with the "long list" of his friends' convictions. The court sustained the prosecutor's objection. At the end of testimony, the court instructed the jury the statements of counsel were not evidence.

In redirect examination of the same police officer, the prosecutor posed the leading question, "you know that Sharron Griffin is not the only one in this courtroom who possessed a firearm," while gesturing toward Mr. Washington. Defense counsel objected. The prosecutor then stated that he would put on a witness who would testify to Mr. Washington's firearm possession. When the prosecutor did call witnesses to testify on this matter, the district court sustained objections of defense counsel. The court instructed the jury to disregard the legal arguments and objections of counsel.

On direct examination, Officer Garrison stated that Mr. Washington had been arrested for domestic violence. The district court instructed the jury to disregard that statement.

In his opening statement, the prosecutor referred to electronic scales seized from 2253 S. Belmont. Although a pretrial order notes such scales were found, evidence was never offered at trial. The government states that after defense counsel objected to questioning of a police officer present when the scales were seized, the government "changed its evidence presentation and simply overlooked the scales."

A criminal conviction "is not to be lightly overturned on the basis of a prosecutor's comments standing alone." United States v. Young, 470 U.S. 1, 10, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Improper prosecutorial statements must be viewed in the context of the strength of the evidence; whether curative instructions were given; and, whether the

prosecution was responding to an attack made by defense counsel. See Oles, 994 F.2d at 1524.

Applying the Oles test, there is strong evidence against Mr. Washington, including his palm print on the safe, items seized under the search warrant, the audio tape recording, and various witness testimony. The district court gave curative instructions on the statements about Mr. Washington's friends with convictions, firearms possession, and domestic violence arrest. Moreover, defense counsel opened the door for the prosecutor's statements on the criminal convictions of Mr. Washington's friends. Although the prosecutor's statement about the scales became improper because this evidence was not admitted, United States v. Dickey, 736 F.2d 571, 599 (10th Cir.1984), it is very unlikely this statement alone impaired the jury's ability to judge the evidence fairly. Young, 470 U.S. at 12. In light of these factors mitigating the influence of the prosecutor's conduct on the jury, Mr. Washington has failed to show the trial court abused its discretion in denying his motion for a new trial.

G.

*9 Mr. Washington next argues the district court erred by failing to exclude evidence of prior convictions, cash possession, and a "drug dealer profile." The district court denied his motion in limine to exclude any evidence of his possession of large amounts of cash. Subsequent testimony established seizures of over $40,000 from him. Mr. Washington's prior conviction of possession of cocaine was admitted as Fed.R.Evid. 404(b) proof of knowledge and intent. Although he objects to the government's use of drug dealer profile evidence, he cites no testimony in the record relating to such a profile. [FN4] We review for abuse of discretion the district court's admission or exclusion of evidence, Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir.1995); United States v. Davis, 40 F.3d 1069, 1073 (10th Cir.1994), including Fed.R.Evid. 404(b) evidence. United States v. Hardwell, 80 F.3d 1471, 1488 (10th Cir.1996).

FN4. Counsel has failed to comply with 10th Cir. R. 28.2(b).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Fed.R.Evid. 403. To be unfairly prejudicial under Fed.R.Evid. 403, evidence must not be merely damaging to a party's case, but must also have an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." United States v. Martinez, 938 F.2d 1078, 1082 (10th Cir.1991) (citations omitted).

In the context of drug distribution cases, large sums of cash are sufficiently probative to warrant admission under Fed.R.Evid. 403. Id. at 1085. This is a drug distribution case where the district court ruled the probative value of the large sums of cash was not outweighed by the danger of unfair prejudice. Mr. Washington's arguments on unfair prejudice are not convincing because, as we have already noted, there is a wealth of "other evidence" of his participation.

Evidence of other crimes, wrongs, or acts may be admissible under Fed.R.Evid. 404(b) if it complies with certain strict standards. United States v. Robinson, 978 F.2d 1554, 1558-59 (10th Cir.1992). Because Mr. Washington denied knowledge of or intent to distribute the crack, and asserted the palm print on the safe must have reflected accidental touching, evidence of his past possession had probative worth in establishing intent, knowledge, and absence of mistake or accident. Mr. Washington tries to distinguish the previous offense on grounds it involved only 30 grams of cocaine, whereas the instant charge is for over 400 grams, and it occurred over six years before the most present offense. These arguments do not establish an abuse of discretion in the trial court's finding that the offenses were sufficiently similar and close in time to the current matter. Mr. Washington has not shown the relevance and probative value of this evidence were substantially outweighed by the potential for unfair prejudice.

*10 Several courts have condemned the use of profiles as substantive evidence of guilt. United States v. McDonald, 933 F.2d 1519, 1521 (10th Cir.1991). Because we have not been shown where such evidence was used in this case, this argument is specious.

H.

At trial, Mr. Washington objected to the submission of an aiding and abetting instruction. He argues Ms.

Griffin's possession with intent to distribute the crack cocaine was distinct from any charges involving him. We review de novo the sufficiency of jury instructions in a criminal case. United States v. Barrera-Gonzalez, 952 F.2d 1269, 1271 (10th Cir.1992). We review de novo whether the jury should have been given a matter to decide. United States v. Pena, 930 F.2d 1486, 1491 (10th Cir.1991).

Despite Mr. Washington's argument, we have already held, "a defendant can be convicted as an aider and abettor even though he was indicted as a principal for commission of the underlying offense and not as an aider and abettor, providing that the commission of the underlying offense is also proven." United States v. Langston, 970 F.2d 692, 706 (10th Cir.1992) (citations omitted). When the jury is instructed on both theories, we affirm the convictions if the government has sufficiently proved either the substantive offense or the aiding and abetting offense. Id. Mr. Washington's distinction between cocaine stored in the bedroom versus in the safe does not immunize him from conviction for aiding and abetting.

I.

At the conference on jury instructions, Mr. Washington objected that the proposed instructions defining "possession with intent to distribute" and "aiding and abetting" failed to properly define the element of "intent." We conduct a de novo review to determine whether, as a whole, jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards. United States v. Winchell, 129 F.3d 1093, 1096 (10th Cir.1997). When we review a claim of error in jury instructions, "we consider all the jury heard and, from [the] standpoint of the jury decide not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to determine these issues." United States v. Voss, 82 F.3d 1521, 1529 (10th Cir.1996). "No particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1365 (10th Cir.1994) (internal quotation and citation omitted).

Mr. Washington argues that the first element of the instruction given on possession with intent to distribute failed to define accurately the element of intent. He also proposes the aiding and abetting instruction could have been improved if the third element of that instruction were "replaced with 'that the defendant acted with the intention of causing the crime to be committed.' "

***11** We believe the instructions as a whole properly inform the jury of the factors it had to find to convict. Even without the words preferred by Mr. Washington, the instructions on both counts provided the jury with "an intelligent, meaningful understanding of the applicable issues and standards." Winchell, 129 F.3d at 1096 (quotation and citation omitted). Because we lack "substantial doubt that the jury was fairly guided," we cannot reverse. Id.

J.

Appellant next questions the sentence he received. We review the district court's interpretation of sentencing statutes and guidelines de novo, United States v. Smartt, 129 F.3d 539, 540 (10th Cir.1997), and the district court's factual findings in support of sentence enhancement for clear error. United States v. Valdez-Arieta, 127 F.3d 1267, 1270 (10th Cir.1997). We will "not reverse the district court's findings unless they are without factual support in the record or unless after reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been made." Id. at 1270 (internal quotations and citations omitted).

The government provided Mr. Washington with notice that it planned to introduce into evidence his 1990 conviction for cocaine possession, as well as his domestic violence arrest. Mr. Washington objected at sentencing to the addition of criminal history points for two previous disorderly conduct convictions. The district court overruled his objections. Under the Sentencing Guidelines, the district court determined a total offense level of 34 and a criminal history category of III, resulting in a sentence of 240 months. This sentence is consistent with the statutory minimum penalty of twenty years for possessing more than 50 grams of crack cocaine after a prior conviction for a felony drug offense. 21 U.S.C.A. § 841(b).

When the Sentencing Guidelines conflict with statutes, the statutory law prevails. United States v. Allen, 16 F.3d 377, 379 (10th Cir.1994). Further, "where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b). Twenty years or 240 months is the statutory minimum sentence for an offense involving more than 50 grams of crack cocaine following a previous felony conviction. 21 U.S.C. § 841(b)(1)(A)(iii). Because the statutory minimum applies in this case, any error in the calculation of the guideline sentence is irrelevant.

K.

In support of a post-trial motion for a new trial based on newly discovered evidence, Mr. Washington offered the affidavit of Johnnie Dean who, according to the affidavit, would testify that he had observed Ms. Griffin open the safe, remove cocaine, and sell it to another individual. In pretrial interviews by the prosecution and the defense, this "new" witness had not disclosed any information about the safe or its contents. The district court dismissed the motion for a new trial. We review the district court's decision for abuse of discretion. United States v. Sinclair, 109 F.3d 1527, 1531 (10th Cir.1997); United States v. Toro-Pelaez, 107 F.3d 819, 827 (10th Cir.1997).

***12** Trial courts may grant a new trial "if required in the interest of justice." Fed.R.Crim.P. 33. However, this court has explained that "a motion for a new trial is not regarded with favor and should only be granted with great caution." Sinclair, 109 F.3d at 1531. A new trial may be granted only under delineated circumstances. United States v. Stevens, 978 F.2d 565, 570 (10th Cir.1992).

It is not entirely clear why Mr. Dean did not reveal his knowledge about Ms. Griffin's sale of cocaine from the safe when he was interviewed by the prosecution and defense. Mr. Washington states that Mr. Dean had feared that he, too, would be charged if he talked about drug purchases, but he finally came forward to prevent Mr. Washington from going to jail for a crime he did not commit. The government's view is that Mr. Dean "lied" to the investigators. The sentencing trial record shows Mr. Dean said he did not share this information with investigators because they did not ask him about it. In any case, circumstances cast doubt on whether the evidence was discovered after trial or whether a lack of due diligence caused the defendant's failure to discover it in time for trial.

Mr. Washington argues the new evidence does not merely impeach the credibility of Ms. Griffin, but also supports the defense theory that Ms. Griffin was the owner and dealer of the cocaine. Therefore, he believes the new evidence is material to the principal issue in the case--the ownership of the safe and cocaine--and that with this evidence, a jury would probably acquit in a new trial. Further, if the defense had been able to use this evidence in the original trial, Mr. Washington claims the district court would have looked more favorably on his request for access to the confidential informant. Although his conjectures may be plausible, we cannot say the district court abused its discretion in finding otherwise.

We AFFIRM the district court on all of the issues raised on appeal. Mr. Washington has not shown that the cumulative effect of governmental misconduct deprived him of a fair trial or due process of law, or that the district court erred in denying any of his motions on evidentiary and discovery issues. The instructions to the jury provided a sufficient statement of the law and standards. Further, Mr. Washington's "new" post-trial evidence did not offer grounds for a new trial.

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